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## Articles

### Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications

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Listed below are the main abbreviations used in this article.

- A.A. *Auswärtiges Amt*. German Foreign Office Archives. Political Department (1A)  
(Berlin, presently Bonn).  
FO British Foreign Office Archives.  
N.S. *Nouvelle Série*. French Foreign Ministry Archives (AMAE), Departments Turquie  
(Arménie) and Jeunes Turcs. GUERRE: volumes 887-889 covering events  
relating to Armenia from August, 1914 - May, 1918 under the heading Turquie.  
RG(L) *Record Group*, U.S. National Archives, Papers Relating to the Foreign Relations  
of the U.S. 1 The Lansing Papers 1914-1920.

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RG(S) *Record Group*, U.S. National Archives, Papers Relating to the Foreign Relations of the U.S. 1915 Supplement World War I.

T.V. *Takvimi Vekayi*. Official gazette of the Ottoman government, whose special supplements covering the proceedings of the Extraordinary Turkish Military Tribunal served as a judicial gazette.

*Editors' Note:* The accuracy of the sources used in this article was verified by an independent translator jointly hired by the *Yale Journal of International Law* and Professor Dadrian. The *Journal* took this unprecedented step because the location of the sources and the variety of foreign languages in which the materials appear made an exhaustive review by the *Journal* staff impossible. The *Journal* did, however, run spot checks to confirm the independent verifier's work. Due to the nature of the sources and the methods by which the information was obtained, exact dates and page numbers were occasionally unavailable. The *Journal* and Professor Dadrian have endeavored to provide as much information as possible about each source.

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## Introduction

If a man is killed in Paris, it is a murder; the throats of fifty thousand people are cut in the East, and it is a question.

Victor Hugo<sup>1</sup>

During World War I, as the rest of the world looked on, the Ottoman Empire carried out one of the largest genocides in the world's history, slaughtering huge portions of its minority Armenian population. The Armenian genocide followed decades of persecution by the Ottomans and came only after two similar but smaller round of massacres in the 1894-96 and 1909 periods had resulted in two hundred thousand Armenians deaths. In all, over one million Armenians were put to death. The European Powers, who defeated the Turks time and again on the battlefield, were unable or unwilling to prevent this slaughter. Even worse, they failed to secure punishment of the perpetrators following World War I. The events of that time have subsequently slipped into the

1. *Quoted in* Peterson, 61 CATHOLIC WORLD 665, 667 (1895).

shadows of world history,<sup>2</sup> thus gaining the title "the forgotten genocide."<sup>3</sup> To this day, Turkey denies the genocidal intent of these mass murders.<sup>4</sup>

Over the past seventy years, the Armenian nation has struggled to have the history of the Armenian genocide brought to light. Despite the scope of the slaughter, however, the international community has only recently recognized the genocide officially. In April 1984, a group of public figures (including three Nobel Prize laureates, among whom was the late international jurist Sean McBride) conducted "People's Tribunal" hearings on the Armenian genocide and adjudged it to be a crime without statutory limitations.<sup>5</sup> In August 1985, the U.N. Subcommission on Human Rights, which had been deadlocked for over fourteen years, took note, by a 14-1 vote (with 4 abstentions), of the historical fact of the Armenian genocide.<sup>6</sup> Its parent body, the U.N. Commission on Human Rights, followed suit the next year.<sup>7</sup> Finally, in June of 1987, the European Parliament declared the Turkish massacres of World War I to be a crime of genocide under the U.N. Convention on Genocide,<sup>8</sup> and stipulated that Turkey must recognize the genocide before the Parliament would favorably consider Turkey's application for membership in that body. The European Parliament labelled Turkey's refusal to do so

2. A prominent expert on genocide describes these shadows as "the United Nations memory hole." L. KUPER, *GENOCIDE* 219 (1981).

3. D. BOYAJIAN, *ARMENIA: THE CASE OF A FORGOTTEN GENOCIDE* (1972); Housepian, *The Unremembered Genocide*, 42 *COMMENTARY* 55-61 (Sept. 1966) (published as a pamphlet).

4. See, e.g., K. GÜRÜN, *ERMENİ DOSYASI* (1983) (reversing victim-perpetrator roles in Armenian conflict and denying Turkish genocidal intent); K. GÜRÜN, *THE ARMENIAN FILE: THE MYTH OF INNOCENCE EXPOSED* (1985) (English translation of preceding); Ş. OREL & S. YUCA, *ERMENİLERCE TALAT PAŞA'YA ATFEDİLEN TELEGRAFLARIN GERÇEK YÜZÜ* (The Real Nature of the Telegrams Attributed to Talat Pasa by the Armenians) (1983) (denying authenticity of telegrams reflecting central planning of Armenian massacres); N. ÖZKAYA, *LE PEUPLE ARMENIEN ET LES TENTATIVES DE RENDRE EN SERVITUDE LE PEUPLE TURC* (The Armenian People and the Attempts to Subjugate the Turkish People) (1971) (blaming Armenian revolutionaries for massacres of Armenians preceding and attending genocide).

5. *PERMANENT PEOPLES' TRIBUNAL, A CRIME OF SILENCE: THE ARMENIAN GENOCIDE* (1985).

6. U.N. ESCOR Comm. on Human Rights, Sub-Comm. on Prevention of Discrimination and Protection of Minorities (38th sess.) (Item 57) at 7, U.N. Doc. E/CN.4/Sub.2/1985/SR.36 (1985) (summary record of 36th meeting, Aug. 29, 1985).

7. It is significant that Whitaker, author of the report that the Subcommission based its finding on and a British expert-member of the Subcommission renowned for his judiciousness, took eight years to research the matter. See Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, 38 U.N. ESCOR Comm. on Human Rights, Subcomm. on Prevention of Discrimination and Protection of Minorities, (Agenda Item 4), at 8-9, U.N. Doc. E/CN.4/Sub.2/1985/6 (1985). In a revised and updated report Whitaker made some corrections at the end of the Subcommission's deliberations; e.g., in note 13, he changed "1 million" to "40%." U.N. Doc. E/CN.4/Sub.2/1985/6/Corr.1 (1985).

8. Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.



an “insurmountable obstacle[ ] to consideration of the possibility of Turkey’s accession to the [European] Community.”<sup>9</sup>

The relatively low impact of the genocidal killing of one million Armenians on modern public consciousness raises serious questions about the ability of the international community to prevent or punish acts of genocide. Many see the lack of action following the Armenian genocide as an important precedent for the subsequent Jewish Holocaust of World War II. Indeed, it has been reported that, in trying to reassure doubters of the desirability and viability of his genocidal schemes, Hitler stated, “Who, after all, speaks today of the annihilation of the Armenians?”<sup>10</sup> This connection was raised repeatedly during the U.S. Senate’s consideration of the U.N. Convention on Genocide, which the United States ratified on February 19, 1986. A score of Senators, most notably Senators Doyle, Boschwitz, Proxmire, Lugar, Levin, Lautenberg, Riegle, Kerry, and Wilson, emphasized the historical precedent of the Armenian case and pointed to the enormous suffering of the Jewish Holocaust that resulted from humanity’s disregard of the Armenians’ fate.<sup>11</sup>

The failures that preceded and followed the Armenian genocide carry important lessons for present-day international scholars and lawyers seeking to outlaw genocide. While the post-World War II trials in Nuremberg have shaped much of the current thought on the prevention and

9. *Resolution on a Political Solution to the Armenian Question*, EUR. PARL. RESOLUTION Doc. A2-33/87, No. 10 (Armenian Question), at 31 (1987). The chronology of the treatment of the Armenian Question in the European Parliament, along with the text (comprising 15 points) is in *THE ARMENIAN WEEKLY* (Boston), June 27, 1985, at 5; *THE ARMENIAN MIROR SPECTATOR* (Boston), July 18, 1987, at 3.

10. K. BARDAKJIAN, *HITLER AND THE ARMENIAN GENOCIDE* 6 (1985).

11. 132 CONG. REC. S1355-80 (daily ed. Feb. 19, 1986). This historical evidence should be born in mind in considering the recent legislation enacted in the United States that criminalizes genocide under domestic law. In November 1987, a bill was introduced in the Senate by Senators Joseph Biden, William Proxmire, and Howard Metzenbaum, creating a new Federal crime of genocide or attempted genocide. President Reagan signed the bill into law on November 4, 1988. Genocide and attempted genocide is now punishable by imprisonment for not more than twenty years, a fine of not more than \$1,000,000, or both. These provisions apply only to nationals of the United States or to an offense committed within U.S. borders.

J. Griffin, Chairman, Section of International Law and Practice, and J.F. Murphy, Chairman, Committee on United Nations Activities Section of International Law and Practice, American Bar Association, made the following statement on February 19, 1988, before the Senate Judiciary Committee in support of the bill:

As familiar as are the historic examples of genocide against the Armenians and the Jews, genocide is a contemporary crime of shocking magnitude, and we must prepare ourselves to fight it— . . . What is left to do is, somewhat surprisingly, quite simple: The international crime of genocide must be made part of the criminal law of the United States. In a word, we must formally recognize that which even the few opponents of the treaty must surely concede—that in the United States, as in the world, genocide is a crime. . .

. . . This is good legislation which should have been the law of our land 40 years ago.

We pledge our support to make it the law now.

Statement of J. Griffin and J.F. Murphy, at 4-5, 7 (unpublished material on file with author).

punishment of genocide, the trials resulted from a set of conditions that will rarely arise. Following World War II, Germany was forced to surrender unconditionally to the Allied forces. The Allies subsequently ran the German government, eliminating any claim of sovereignty that Germany otherwise could have asserted. Furthermore, seeking retributive justice against the Nazis promoted the Allies' self-interests, since much of the Nazi persecution was directed at the Allies' own nationals under German occupation.

Unfortunately, none of these factors were present during or after the slaughter of the Armenians. Although the European Powers did pursue a strategy of "humanitarian intervention" in Ottoman Turkey during the years leading up to World War I, and they instituted the concept of "crimes against humanity" in 1915 in response to the unfolding genocide, the Powers never shared the unity of interests that they had following World War II. Most harmful to the Armenians was the lack of a powerful state to champion their cause; thus, the victors of 1918 willingly dropped their humanitarian concerns in exchange for enhanced favor with the Kemalist regime that was gaining control of Turkey. In addition, the Allies allowed the Turks to maintain their own government following their defeat in the war. As a result, the Turkish government blocked efforts by the Allies to punish the perpetrators of the genocide by asserting its sovereign rights. While it is difficult to determine for certain, the recent history of killings in Cambodia, Bangladesh, and Ethiopia indicate that the ineffective efforts at genocide prevention preceding World War I and the frustrated efforts at punishment following it are more likely to be the norm than are the Nuremberg trials.

The truth is that the U.N. Convention on Genocide's classification of genocide as a crime under international law, while a positive step, begs the ultimate question of enforcement. Similarly, although the Nuremberg trials stand as a promising example of international cooperation in punishing acts of genocide, one cannot rely on such a complete convergence of interests arising in every case. This paper examines the unhappy history of the Armenian genocide; perhaps by studying the failures as well as the successes of the past, it may be possible to better understand and thus resolve the difficulties in preventing genocide.

There are three main lessons that emerge from the events surrounding the Armenian genocide. First, nations generally will not be able, and thus cannot be expected, to effectively police or punish themselves. The post-World War I trials in Turkey, as well those in Germany, reveal the futility of trusting domestic processes to obtain retribution for state-sanctioned crimes against humanity. The Courts Martial in Turkey are nota-

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ble in that they documented the crime of organized mass murder against the Armenians. These trials, however, resulted in only a small number of convictions under Turkish penal law. The political upheaval attending Turkey's response to military defeat impaired, and ultimately destroyed, the judicial proceedings' effectiveness. The Kemalist regime that eventually gained power in post-war Turkey successfully relied on principles of national sovereignty to reject the authority of the European Powers to intervene in the trials. Further, the Kemalists weakened European resolve in this area by manipulating the political tensions that divided the Allies. In Turkey, the rise of nationalist feelings following the Kemalists' emergence conflicted with the purposes behind the prosecution of the accused war criminals. The Turkish government and people were unwilling to accept the stigma of collective guilt that was implied in these trials.

A second lesson emerging from the Armenian genocide is that groups of international actors cannot prevent or punish genocidal acts by another state when they do not remain cohesive and unequivocally committed to such ends. In World War I, the Allied Powers decisively defeated the Turkish forces. Further, through their May 24, 1915 declaration expressing their intent to punish the perpetrators of the genocide, England, France, and Russia provided a basis for international jurisdiction over the genocidal acts of the Ittihad government of Turkey. The Allied powers, however, were still unable to secure retribution for the genocide. Instead, their efforts floundered on political divisions between the countries and an inability, or an unwillingness, to usurp the Ottomans' sovereign right to punish their own people for acts committed against Ottoman subjects on Ottoman soil.<sup>12</sup> This failure is not surprising. The interna-

12. When the Paris Peace Conference convened in January 1919, the first item on the agenda was the matter of punishing war crimes. For this purpose, the Allies created the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties. Citing *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812) (opinion of Marshall, C.J.), the two American representatives, Secretary of State Robert Lansing (the Commission's chairman) and James Scott, a leading international law scholar, objected to the projected trial of the German Kaiser by the victorious allies. Arguing that such a trial would imply a measure of "responsibility hitherto unknown to municipal or international law, for which no precedents are to be found in the modern practice of nations," Lansing and Scott denied the Allies the right of "legal penalties" while conceding them the right to impose "political sanctions." *CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR: REPORT OF THE MAJORITY AND DISSENTING REPORTS OF THE AMERICAN AND JAPANESE MEMBERS OF THE COMMISSION ON RESPONSIBILITIES AT THE CONFERENCE OF PARIS, 1919*, Pamphlet No. 32 [hereinafter *VIOLATIONS*]. The dissenting opinions are at pp. 58-79.

By the same token, the genocide perpetrated against the Armenians was excluded from the category of "war crimes" to be prosecuted and punished by the Allies. As Willis put it:

Not until 1948 would genocide . . . be clearly defined as an international crime, and in 1919 adherence to time-honored notions of sovereignty placed limitations upon the scope

tional system, including the United Nations, often countenances acts of sovereign nations that extend to instances of organized violence and mass murder. Noted international law scholar Kuper has explicitly addressed this problem:

[T]he United Nations remains highly protective of state sovereignty, even where there is overwhelming evidence, not simply of minor violations, but of widespread murder and genocidal massacre. It is no wonder that it may seem to be a conspiracy of governments to deprive their people of their rights.<sup>13</sup>

The final, and perhaps most daunting, lesson of the Armenian genocide is that when international actors intervene in response to persecutions in another state without firm coordination and commitment, any actions they take may actually do more harm than good. Through their humanitarian intervention in Turkish affairs during the late nineteenth and early twentieth centuries, the European Powers were able to force the Ottoman government to adopt a number of statutory provisions ensuring equal rights for non-Muslim minorities (such as the Armenians). These statutes raised the national consciousness of the Armenian population, who began to press for the actual implementation of these reforms. Unfortunately, the Ottomans had no intention of enforcing these statutes; they had adopted them merely to appease the Europeans. The European Powers were willing to accept the statutes at face value and never truly attempted to force Ottoman compliance; nor did they offer the Armenians the military or political support that they would need to actually acquire these statutory rights. The Muslim majority in Ottoman

of traditional laws and customs of war. The Hague conventions . . . [did not deal] with a state's treatment of its own citizens. . . . From this perspective, Turkish action against Armenians was an internal matter, not subject to the jurisdiction of another government.

J. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 157 (1982).

Yet as Secretary of State during the war, Lansing did sanction a degree of intervention which he felt the brutality of the Turkish measures against the Armenians justified. In a Nov. 21, 1916 letter to President Wilson, Lansing granted the "more or less justifiable" right of the Turkish government to deport the Armenians, in so far as they lived "within the zone of military operations." But, he added: "It was not to my mind the deportation which was objectionable but the horrible brutality which attended its execution. It is one of the blackest pages in the history of this war, and I think that we were fully justified in intervening as we did in behalf of the wretched people, even though they were Turkish subjects." RG (L) 59, 763.72115/2631c; L. at 42-43. As far as it is known, only once did William Jennings Bryan, Lansing's predecessor, issue explicit instructions to Ambassador Morgenthau in Turkey "to secure from Turkish Government order to civil and military officials throughout Palestine and Syria that they will be held personally responsible for lives and property of Jews and Christians in case of massacre and looting. This is required immediately." The occasion for this instruction was the rising tide of anti-Semitism in Syria and Palestine and the concomitant apprehension of organized pogroms during the war. RG (S) 59, 367.116/309a; S. at 979.

13. L. KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 182 (1981).

Turkey, who had long viewed the Armenians and other non-Muslims as "tolerated infidels," seized upon the new Armenian nationalism as an excuse to rid themselves of the "Armenian problem." Thus, the humanitarian intervention of the Europeans, however benign in its intentions, created the conditions that ultimately led to the genocide.

In the first section, I will examine the Islamic tenets that shaped the Ottoman society and show how these religious beliefs led the Turks to subvert the European efforts at humanitarian intervention, both in general and in the specific case of the Armenians. In the second section, the implementation and execution of the Armenian genocide by the Ittihadist regime in Turkey under the cover of World War I will be discussed. Next, in Section III, I will look at the efforts at retribution, both internationally and domestically, and detail the divisions within the European Powers and the nationalistic pressures within Turkey that doomed these efforts to failure. This paper will conclude by considering the lessons that the history of the Armenian genocide has for modern efforts at outlawing such acts of mass murder in the future.

There is one last vital aspect of this paper that must not be overlooked. For over seventy years, the massacre of the Armenian people has been "the forgotten genocide." Many of the facts that are discussed in this paper have never before been published.<sup>14</sup> Incredibly, the Turkish government still denies that these massacres occurred. More than one million Armenian men, women, and children were methodically and deliberately murdered in Ottoman Turkey. It is time, at last, that the world hear their cries.

14. It is important to emphasize that much of the documentation for this paper comes from within Ottoman-Turkey and her allies during World War II, Germany and Austria. Specifically, these sources include:

1. Secret and top secret Ottoman-Turkish state documents, every one of which was authenticated by ministerial officials before being introduced in the Turkish Court Martial Proceedings.
2. The preponderance of German and Austrian documents anticipating and corroborating the findings of the Turkish Military Tribunal. The importance of these documents cannot be overemphasized. Germany and Austria were the political and military allies of Turkey during World War I. Their representatives' confidential reports composed during and after the Armenian massacre reveal the enormity of the crime.

# I. Humanitarian Intervention by the Powers: A Historical Perspective

## A. *Islamic Sacred Law as a Matrix of Ottoman Legal Order and Nationality Conflicts*

As a first step toward a full analysis of the Armenian Genocide, it is essential to see the events leading up to and following the genocide within the context of the Islamic culture of Ottoman Turkey and the common law principles that were derived from this culture. Islamic tenets heavily influenced the growth of the Ottoman Empire. Although Islam is a religious creed, it is also a way of life for its followers, transcending the boundaries of faith to permeate the social and political fabric of a nation. Islam's bent for divisiveness, exclusivity and superiority, which overwhelms its nominal tolerance of other religions, is therefore vital to an understanding of a Muslim-dominated, multi-ethnic system such as Ottoman Turkey.

The Islamic character of Ottoman theocracy was a fundamental factor in the Ottoman state's legal organization. The Sultan, who exercised supreme political power, also carried the title of Khalif (meaning Successor to Mohammed) and thereby served as the supreme protector of Islam. Thus, the Sultan-Khalif was entrusted with protecting the canon law of Islam, called the *Şeriat*, meaning revelation (of the laws of God as articulated by the prophet Mohammed). The *Şeriat* comprised not only religious precepts, but a fixed and infallible doctrine of duties, including regulations of a juridical and political nature, whose prescriptions and proscriptions were restricted to the territorial jurisdiction of the State.

These Islamic doctrines embraced by the Ottoman state circumscribed the status of non-Muslims within its jurisdiction. The Ottoman system was not merely a theocracy but a subjugative political organization based on the principle of fixed superordination and subordination governing the legal relations between Muslims and non-Muslims, and entailing social and political disabilities for the latter.<sup>15</sup> The Koran, the centerpiece of the *Şeriat*, embodies some 260 verses, most of them uttered by Mohammed in Mecca, enjoining the faithful to wage *cihad*, holy war, against the "disbelievers," e.g., those who do not profess the "true faith" (*hakk din*), and to "massacre" (*kital*) them.<sup>16</sup> Moreover, the verse "Let

15. BAT YE'OR, *THE DHIMMI: JEWS AND CHRISTIANS UNDER ISLAM* 48, 49, 62, 67, 70, 76, 84, 89, 108, 140-41, 143, 154-56; Doc. No. 52, *The Armenians*, 281-88; Doc. No. 53, *Obstacles to Christian Emancipation* 289-90, Jacques Ellul's Preface 26-33 (D. Maisel, P. Fenton, D. Littman trans. 1985) (Bat Ye'or is the pseudonym of Y. Masriya).

16. *Koran* ch. 47, verse 4; ch. 9, verse 124; ch. 2, verse 211; ch. 3, verses 8, 68, 135; ch. 8, verse 12; ch. 9, verses 29, 38, and 41.

there be no violence in religion”<sup>17</sup> is superseded and thus cancelled (*men-suh*) by Mohammed’s command to “wage war against the unbelievers and be severe unto them.”<sup>18</sup> The verse that has specific relevance for the religious determination of the legal and political status of non-Muslims whose lands have been conquered by the invading Islamic warriors has this command: “Fight against them. . .until they pay tribute (*ciziye*) by right of subjection, and they be reduced low.”<sup>19</sup> This stipulation is the fundamental prerequisite to ending warfare and introducing terms of clemency.

The Ottoman Empire’s Islamic doctrines and traditions, reinforced by the martial institutions of the State, resulted in the emergence of principles of common law which held sway throughout the history of the Ottoman socio-political system. The Sultan-Khalif’s newly incorporated non-Muslim subjects were required to enter into a quasi-legal contract, the *Akdı Zimmet*, whereby the ruler guaranteed the “safeguard” (*ismet*) of their persons, their civil and religious liberties, and, conditionally, their properties, in exchange for the payment of poll and land taxes, and acquiescence to a set of social and legal disabilities. These contracts marked the initiation of a customary law in the Ottoman system that regulated the unequal relations between Muslims and non-Muslims. Ottoman common law thus created the status of “tolerated infidels [relegated to] a caste inferior to that of their fellow Moslem subjects.”<sup>20</sup> The Turkish scholar N. Berkes further pointed out that the intractability of this status was a condition of the *Şeriat* which “could not admit of [non-Muslim] equality in matters over which it ruled. [Even the subsequent secular laws based on] the concept of *Kanun* (law) did not imply legal equality among Muslims and non-Muslims.”<sup>21</sup>

This principle of Ottoman common law created a political dichotomy of superordinate and subordinate status. The Muslims, belonging to the *umma*, the politically organized community of believers, were entitled to remain the nation of overlords. Non-Muslims were relegated to the status of tolerated infidels. These twin categories helped perpetuate the divisions between the two religious communities, thereby embedding conflict into the societal structure. Moreover, the split transcended the political power struggle occurring in Ottoman Turkey during this time period. Even when the Young Turk Ittihadists succeeded Sultan Abdul

17. *Id.* ch. 2, verse 257.

18. *Id.* ch. 9, verse 74.

19. *Id.* ch. 9, verse 29.

20. 1:2 H. GIBB & H. BOWEN, *ISLAMIC SOCIETY AND THE WEST* 208 (1962).

21. N. BERKES, *THE DEVELOPMENT OF SECULARISM IN TURKEY* 94 (1964).

Hamit into power in 1908, they reaffirmed the principle of the ruling nation (*milleti hakime*). While promising liberty, justice and equality for all Ottoman subjects, they vowed to preserve the superordinate-subordinate dichotomy. That vow was publicly proclaimed through *Tanin*, the official publication of the Ittihad party. Hüseyin Cahid, its editor, declared in an editorial that irrespective of the final outcome of the nationality conflict in Turkey, "the Turkish nation is and will remain the ruling nation."<sup>22</sup>

The Ittihad's adherence to the ruling nation principle is particularly noteworthy because the Ittihad were not followers of the tenets of Islam. While the Ittihad continued to run the state largely as a theocracy, its leaders were personally atheists and agnostics.<sup>23</sup> These leaders, however, recognized the pervasive influence of Islam in the country and resolved to exploit it in their plans to eliminate the sources of domestic nationality conflicts. The Ittihad's actions reveal a central truth of the use of political power within Ottoman Turkey: actual power or influence within the Ottoman Empire could only exist to the extent that it recognized and incorporated the tenets of Islam. These tenets embodied an inherent resistance to change, rendering the specter of innovation threatening, and thus unacceptable, to Muslim subjects.<sup>24</sup>

#### B. *European Efforts at Humanitarian Intervention and Its Subversion Under the Islamic Common Law Principles of the Turks*

The European Powers' "humanitarian intervention" efforts in Ottoman Turkey severely clashed with the fundamental facts of Turkish politics. Derived from entrenched customs of long standing (*adet*), the Islamic common law principle of a ruling nation within the state directly conflicted with the egalitarian principles of European public law. While the European Powers succeeded in imposing their legal principles on for-

22. TANIN (Istanbul), Oct. 25, 1908.

23. Mardin described this irreligiosity as follows: "Distrust added to disgust was their attitude toward institutional Islam. . . [yet they saw fit to develop] a manipulative instrumental attitude toward religion." Mardin, *Ideology and Religion in the Turkish Revolution*, 2 INT'L J. MIDDLE EAST STUD. 207-08 (1971). Morgenthau confirms this view from his personal contacts with these leaders. "I can personally testify that he [Talat] cared nothing for Mohammedanism for, like most of the leaders of his party, he scoffed at all religions. 'I hate all priests, rabbis and *hodjas*,' he once told me. . . Practically all of them were atheists." H. MORGENTHAU, AMBASSADOR MORGENTHAU'S STORY 20, 323 (1918). An American-educated Turkish sociologist added, "Religion was used [by Ittihad] as a basis of agitation to secure popularity." A. YALMAN, THE DEVELOPMENT OF MODERN TURKEY AS MEASURED BY ITS PRESS 100 (1914).

24. As Leon Festinger stated in his general theory of cognitive dissonance, the existence of an opposing set of beliefs makes the individual less certain of his own beliefs. That individual then acts on his own beliefs more strongly in order to compensate for his uncertainty. L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE 263-66 (1957).



mal Turkish law, continued Turkish adherence to the underlying Islamic common law subverted the Europeans' efforts. Only a unified and forceful effort by the European Powers could have overcome the inherent resistance to change within the Islamic culture of Ottoman Turkey. Unfortunately, the Armenian genocide reveals the difficulties in uniting groups of states for effective humanitarian intervention. Specifically, the Armenian Genocide shows that international intervention is unlikely to be successful unless it is either committed to an overriding goal strong enough to counter the entrenched culture of the offending nation state, or is carried out by member-states who are acting to protect their own nationals subject to the offending state's genocidal acts.

### 1. *Humanitarian Intervention in Ottoman Turkey*

#### a. *The origins of humanitarian intervention*

The reign of Catherine the Great in Russia (1762-1796) coincided with the advent of a period of active European concern for the fate of a host of Christian nationalities ruled by the Ottoman State. In the Treaty of Küçük Kaynarca (July 21, 1774),<sup>25</sup> resulting from Catherine the Great's victorious wars against Turkey from 1768 to 1774, article 7 conceded to the Russians a right to intercede on behalf of all Russian Orthodox Church members and, by extension, all Orthodox subjects (such as Greeks and Bulgarians). Pursuant to article 16 of the same treaty, Moldavia, Wallachia, and Serbia became the immediate and direct beneficiaries of this concession.<sup>26</sup> Between 1774-1856, "Russia exercised in Turkey a veritable right of *humanitarian intervention*, albeit limited, to the protection of Orthodox Christians."<sup>27</sup> Thus began a custom in international law that has been termed *l'intervention d'humanité*.

#### b. *European intervention on behalf of Greece*

During the Greek War of Independence (1821- 1830), a series of external attempts to end the war developed this theme of "humanité." England and Russia cooperated to secure limited autonomy for Greece under

25. The English text of the treaty is in 1 J. HUREWITZ, *DIPLOMACY IN THE NEAR AND MIDDLE EAST, A DOCUMENTARY RECORD: 1535-1914* 54-61 (1956). The French text is in A. SCHOPOFF, *LES RÉFORMES ET LA PROTECTION DES CHRÉTIENS EN TURQUIE 1673-1904* 12-13 (1904).

26. See Mandelstam, *Das Armenische Problem im Lichte des Völker-und Menschenrechts*, 12 *INSTITUT FÜR INTERNATIONALES RECHT AN DER UNIV. KIEL* [Lecture Series and Monographs] 15 (1931).

27. A. MANDELSTAM, *LA SOCIÉTÉ DES NATIONS ET LES PUISSANCES DEVANT LE PROBLÈME ARMÉNIEN* 6 (1926) [Special edition of *Revue Générale de Droit Intl. Publ.*](emphasis in original).

Turkish suzerainty.<sup>28</sup> This action was followed in 1827 by the Treaty of London,<sup>29</sup> in which France joined England and Russia in a resolution warning Turkey to stop hostilities lest the three Powers proceed to aid Greece militarily. The Preamble of the London Treaty asserted that this effort was intended to serve the interests of peace in Europe, but also to reflect *un sentiment d'humanité*.<sup>30</sup> While article 5 stated that the contracting parties sought no territorial advantages,<sup>31</sup> Turkey's refusal to comply with a subsequent demand for an armistice led to a new war with Russia and to substantial losses of territory in Asiatic and European Turkey. The war ended in 1830 with the complete independence of Greece. The Note of April 8, 1830, in which England, France, and Russia informed the Ottoman government of their decision to grant Greece independence, contained a reiteration of their desire to "fulfill an imperative duty of humanity in putting an end to the troubles which were devastating these unhappy countries . . . and in even consolidating the existence of the Ottoman Empire."<sup>32</sup> These purportedly "humanitarian interventions" were pivotal in ushering in Turkey's Charter, comprising the twin *Tanzimat* (reordering) reforms, instituted through the 1839 Act of Gülhane and the 1856 Reform Act.<sup>33</sup> By recognizing for the first time the principle of the equality of non-Muslims, the Act of Gülhane had an almost revolutionary thrust. Yet the decree remained, for all intents and purposes, "a dead letter."<sup>34</sup> This pattern was to be repeated in the future.

### c. *The 1856 Reform Act*

Toward the end of the Crimean War (1853-1856), which the Turks had precipitated, the Powers informed Turkey that as one precondition for peace it had to issue, of her own free will (*proprio motu*), a sequel to the Act of Gülhane.<sup>35</sup> Turkey promptly responded with the second Ottoman Reform Act of February 18, 1856, which not only reaffirmed the provisions of its predecessor, but forbade discrimination against and deg-

28. This objective was accomplished with the St. Petersburg Protocol of 1826. 2 G. NORADOUNGHIAN, RECUEIL D'ACTES INTERNATIONAUX DE L'EMPIRE OTTOMAN Doc. No. 37 (1900).

29. *Id.* at 130-34. This treaty was signed on July 6, 1827.

30. *Id.* at 131.

31. *Id.* at 132.

32. *Id.* at 186 (London Protocol of February 3, 1830).

33. See *infra* note 36.

34. 1 E. ENGELHARDT, LA TURQUIE ET LE TANZIMAT OU HISTOIRE DES RÉFORMES DANS L'EMPIRE OTTOMAN 142 (1882).

35. M. ROLIN-JAEQUEMYS, ARMENIA, THE ARMENIANS, AND THE TREATIES v (1891). This work is a revised version of two articles originally published in *Revue de Droit International et de Législation Comparée*, the organ of the Belgian Institute of International Law, dated 1887 and 1889. No translator is indicated.

radation of non-Muslims.<sup>36</sup> Satisfied with the new legislation, the Powers met at the Congress of Paris in February and March of 1856 and issued the Paris Treaty of March 30, 1856.<sup>37</sup> In this treaty, Russia gave up separate claims to a protectorate over the Christians in Turkey, and the Powers expressed appreciation for the new Ottoman Reform Act in article 9.<sup>38</sup>

Religious fundamentalists and secular nationalists in Turkey, however, rejected the 1856 Reform Act. The Turkish people rejected both the idea of equality for non-Muslims and the influence of European powers intervening on behalf of the Christian nationalities.<sup>39</sup> The success of Islam "in integrating the political life of its adherents"<sup>40</sup> faced a major threat.

### d. *Massacre of Christian Maronites*

As the Powers continued to admonish and pressure the Porte (the seat of Ottoman government), the incompatibility of Western law and Islamic religion erupted in a major international incident which prompted military intervention by the Powers. In 1860, the Muslim Druzes initiated a wholesale massacre of Christian Maronites in Syria and Lebanon, then part of the Ottoman Empire.<sup>41</sup> The Powers intervened, describing their actions as humanitarian in the August 3, 1860, Protocol of Paris. This intervention immediately produced the autonomy of Lebanon as formu-

36. For the English texts of both acts see 1 J. HUREWITZ, *supra* note 25, at 113-16 (1839 Gülhane Act), 149-53 (1856 Act). See also F. BAILEY, *BRITISH POLICY AND THE TURKISH REFORM MOVEMENT: A STUDY IN ANGLO-TURKISH RELATIONS 1826-1853* at 277-79 (Act of Gülhane), 287-91 (1856 Reform Act) (1970). For the French texts of same see G. NORADOUNGHIAN, *supra* note 28, at 288-90 (1839 Act); 3 G. NORADOUNGHIAN, *RECUEIL D'ACTES INTERNATIONAUX DE L'EMPIRE OTTOMAN* 83-88 (1902) (1856 Act).

37. The English text of the Paris Treaty is in J. HUREWITZ, *supra* note 25, at 153-56; the French text is in 3 G. NORADOUNGHIAN, *supra* note 36, at 70-79.

38. 3 G. NORADOUNGHIAN, *supra* note 36, at 74.

39. Statutory laws were inimical to "a number of practices derived from the Şeriat and perpetuated through the *millet* system [of religiously defined nationalities]," and the problem was compounded by "the intervention of the powers on behalf of the *millets*. . ." N. BERKES, *supra* note 21, at 147. As Davison asserted, "large parts of [the 1856 Edict] had been dictated by the British, French and Austrian ambassadors." Davison, *Turkish Attitudes Concerning Christian-Muslim Equality in the Nineteenth Century*, 59 AM. HIST. REV. 857 (1954). According to a Turkish historian, the people lamented: "We have lost today our sacred national right which our ancestors had won with their blood. The Islamic nation that was the ruling nation (*milleti hakime*) has been divested of this right. This is a day for weeping and mourning for the Islamic people." 1 A. CEVDET *infra* note 75, at 68.

40. M. WATT, *ISLAM AND THE INTEGRATION OF SOCIETY* 174 (1961).

41. Having received a mandate from the other Powers, a French expeditionary force of 6,000 (half of the total combined European force) restored order and induced the Turkish authorities to exact punishment from the ringleaders of the atrocities. Those involved in the Damascus massacre were hanged by the Grand Vezir Fuad Paşa. FO 371/2488/51010 (minutes of French and British diplomats recounting the events in Apr. 1915).

lated in the *Réglement* of June 9, 1861, and provided for the appointment of a Christian Governor-General.<sup>42</sup>

The Agreement between the European Powers and Turkey outlining the intervention in Lebanon was termed *Protocols pour le rétablissement de la tranquillité en Syrie et la protection des Chrétiens*, thus combining the quest for "order" with that of "protecting the Christians" against massacre.<sup>43</sup> This formula conformed with the first paragraph of article 9 of the Paris Peace Treaty, but it was at odds with the second paragraph of that article, which prohibited interference in the internal affairs of Turkey ("*soit collectivement, soit séparément*"), involving the "Sultan's relationships with his subjects" and his provincial administration.<sup>44</sup>

e. *The Cretan and Balkan insurrections*

The 1866-1868 Cretan insurrection elicited another instance of European intervention. Their action took the form of an 1867 inquiry conducted by the Consuls of France, England, Austria, and Russia examining Turkey's failure to fulfill its 1856 Reform Act commitments. Following this failed insurrection, the Balkan nationalities erupted into open rebellion.

In July 1875, the peoples of Bosnia and Herzegovina rose against Ottoman rule. On December 30, 1875, the Austrian Chancellor Andrassy proposed to the signatories of the Paris Peace Treaty the formation of a Muslim-Christian Commission to enforce the reforms, especially the proviso on the equality before the law of Muslims and Christians alike, and to supervise their implementation.<sup>45</sup> The Sultan again acceded on February 13, 1876. As the bloodshed continued unabated, however, the Powers (with the exception of England which declined to join due to resentment over not being initially consulted) issued the Berlin Memorandum of May 13, 1876, an extension of the previous Andrassy Note.

42. 3 G. NORADOUNGHIAN, *supra* note 36, at 144-49 (*Réglement*).

43. *Id.* at 125 (French text of Protocol).

44. The text of article 9 states:

His Imperial Majesty the Sultan, having in his constant solicitude for the welfare of his subjects, issued a firman which, while ameliorating their condition, without distinction of religion or of race, records his generous intentions towards the Christian populations of his Empire, and wishing to give a further proof of his sentiments in this respect, has resolved to communicate to the contracting parties the said firman, emanating spontaneously from his sovereign will. The contracting Powers recognize the high value of this communication. It is clearly understood that it cannot in any case give the right to the said Powers to interfere, either collectively or separately, in the relations of His Majesty the Sultan with his subjects, nor in the internal administration of his Empire.

J. HUREWITZ, *supra* note 25, at 154. For the original French text of the article see G. NORADOUNGHIAN, *supra* note 36, at 74.

45. E. ENGELHARDT, *supra* note 34, at 145-48. For the full text in French see A. SCHOPFF, *supra* note 25, at 179-80. For the English text see 4 E. HERTSLET, *THE MAP OF EUROPE BY TREATY* 2418-29 (1875).

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The memorandum asked Turkey to agree to an armistice, to grant the Christians the right to keep their arms, and to recognize the principle of supervision of the reforms by the consuls of these Powers.

### f. *The Midhat Constitution*

To forestall European control of the implementation of reforms, Ottoman Turkey adopted the Midhat Constitution.<sup>46</sup> The document's liberal provisions improved upon the preceding Reform Acts. Article 8 proclaimed the common citizenship of all Ottoman subjects, irrespective of religion.<sup>47</sup> Article 9 guaranteed their individual liberty.<sup>48</sup> Article 17 proclaimed their equality before the law, and their rights and duties "without prejudice to religion."<sup>49</sup> The Constitution, however, still deferred to the primacy of Islam. Article 4 designated the Sultan as the protector of Islam in his capacity as Khalif.<sup>50</sup> Article 5 declared that "His majesty the Sultan is irresponsible: His person is sacred."<sup>51</sup> Article 11, moreover, while granting "religious privileges" to the other faiths in the Empire, asserted that "Islamism is the religion of the State."<sup>52</sup>

Neither these new constitutionally-guaranteed rights, nor "the privileges" of article 11 purporting to enshrine the Islamic spirit of toleration of other faiths mitigated the real legal and political disabilities of the non-Muslims, however. The Sultan-Khalif himself obstructed the task of implementation.<sup>53</sup> In addition, one of the high priests of modern Turkish nationalism, Tekin Alp, repudiated the Turkish claim of having granted to the non-Muslim communities, especially the Armenians, privileges of religious autonomy, defining article 11 as "the high separation wall," intended to sustain the segregation and exclusion of the non-Muslims.<sup>54</sup> French international law scholar Engelhardt, in his renowned study on reforms in nineteenth-century Turkey, similarly rejected the notion of "privilege," substituting for it the entrenched practice of "separation, afforded by reasons of state, religious antagonism," and reinforced by

46. OTTOMAN CONST. (Midhat), *reprinted in* 2 AM. J. INT'L L. 367 (Supp. 1908). The French text of the Constitution is in A. SCHOPOFF, *supra* note 25, at 192.

47. OTTOMAN CONST. at 367.

48. *Id.*

49. *Id.* at 369.

50. *Id.* at 367.

51. *Id.*

52. *Id.* at 368.

53. In his book dealing with these obstructions, the son of Midhat Paşa focuses on the Sultan's inveterate aversion to any plan to end segregation, prejudice and discrimination practiced on religious grounds. See A. MIDHAT, *THE LIFE OF MIDHAT PASHA* 108, 141-42 (1903).

54. T. ALP, *TÜRKİSMUS UND PANTÜRKİSMUS* 89 (1915). It should be noted that the word "*imtiyaz*" inserted in article 11 of the Ottoman constitution, while denoting "privilege," also connotes the idea of "separation" or "distinctness" in a more learned diction.

"Muslim disdain" for other religions.<sup>55</sup> This obstruction was nowhere more manifest than in the administration of justice in the provinces. Particularly instructive among the dozen British Blue Books covering the 1879-1881 period,<sup>56</sup> is Turkey No. 8 (1881), in which the British Foreign Office (in its *Reports on the Administration of Justice in the Civil, Criminal, and Commercial Courts in the Various Provinces of the Ottoman Empire*) described numerous cases involving bribery, "organized perjury," venal judges, and violations of the penal codes of the secular (*Nizamiye*) courts at the expense of non-Muslims.<sup>57</sup>

A Belgian jurist specializing in Ottoman legal affairs underscored some of the covert objectives of the new constitution:

It appears only too clearly from this document that the actual aim of the new charter was to postpone the time when Europe would ask the Porte for something more than fair words and laws made for show. In other words, those who used this fine language intended merely to prevent the interests of the Christian nations still under Turkish rule from being formally and *explicitly* put under the protection of European international law, as they had already been *implicitly* placed by the Treaty of Paris.<sup>58</sup>

The new constitution was enacted in the wake of the May 1876 insurrection in Bulgaria, where Turkish irregulars slaughtered an estimated 15,000-20,000 Bulgarian women and children. Known as "the Bulgarian horrors"<sup>59</sup>—prompting British Prime Minister Gladstone to write a pamphlet demanding the expulsion of the Turks from Europe—these atrocities set off the wars with the Serbians and the Montenegrins in June and July of 1876.<sup>60</sup> After the Ottoman Turks refused British and French attempts to negotiate an armistice, the Turks yielded to a Russian ultimatum of October 30, 1876.<sup>61</sup> The ensuing Constantinople Conference

55. 2 E. ENGELHARDT, *LA TURQUIE ET LE TANZIMAT OU HISTOIRE DES RÉFORMES DANS L'EMPIRE OTTOMAN* 299-300 (1884).

56. These official publications of the British Foreign Office are BRITISH FOREIGN OFFICE, BLUE BOOK, TURKEY [hereinafter BLUE BOOK, TURKEY] No. 10 (1879); *id.*, No. 1 (1880); *id.*, No. 4 (1880); *id.*, No. 7 (1880); *id.*, No. 9 (1880); *id.*, No. 23 (1880); *id.*, No. 5 (1881); *id.*, No. 6 (1881); *id.*, No. 10 (1881). The Consuls reporting to London were officers of the English Army and included Captain (later Major) Trotter, Captain (later Major) Everett, Captain Clayton, Lieutenant (later Colonel) Chermiside, Lieutenant Colonel Wilson, and Captain Steward.

57. *Id.*, No. 8 (1881) at 57, 58, 71-72, 109-10. See the citations in M. ROLIN-JAEQUEMYS, *supra* note 35, at 45, 73-76.

58. M. ROLIN-JAEQUEMYS, *supra* note 35, at 33 (emphasis in original).

59. J. MARRIOTT, *THE EASTERN QUESTION (AN HISTORICAL STUDY IN EUROPEAN DIPLOMACY)* 318-34 (4th ed. 1958).

60. Gladstone's pamphlet stirred English public opinion; within a few days, 40,000 copies were sold. As the French writer Maurois paraphrased the sense of the pamphlet, ". . . the Turks, the one great anti-human specimen of humanity. . . there was not a criminal in European gaol, nor a cannibal. . . whose indignation would not rise at the recital of what had been done." A. MAUROIS, *DISRAELI* 308 (1930).

61. For the ultimatum, see 3 G. NORADOUNGHIAN, *supra* note 36, at 399.

failed, however, to secure Turkey's consent to reforms supervised by Europe. In fact, the Turkish government's proclamation of a new constitution precisely at this time, as noted above, served to preempt this scheme of reforms. In response to this proclamation, the Concert of Europe, led by British Prime Minister Salisbury, warned the Turks of the dire consequences of intransigence.<sup>62</sup>

### g. *The London Protocol*

The London Protocol of March 31, 1877,<sup>63</sup> was the final manifestation of Europe's relatively harmonious intervention in Ottoman internal affairs on behalf of oppressed nationalities and minorities. Article 9 empowered the six signatories "to watch carefully" (*de veiller avec soin*)<sup>64</sup> the manner in which the Ottoman government carried out its promises. It provided for consultation and joint action in the event that the Powers were "once more disillusioned."<sup>65</sup> Additionally, the quest for general peace (*la paix générale*) was to guide their actions. The Turkish Plenipotentiary rejected the Protocol as

derogatory to the Sultan's dignity and independence . . . [R]ather than accede to its provisions it would be better for Turkey to face the alternative of war, even if an unsuccessful war, expected to result in the loss of one or two provinces . . . [It] was a virtual abrogation of the IXth Article of the Treaty of Paris. . . . This foreign intervention . . . was a humiliation to which [the] Government would not at any risk submit.<sup>66</sup>

On April 24, exactly two weeks after Turkey formally rejected the London Protocol, the Tsar ordered his armies to cross the frontiers to secure by force what the unanimous efforts of the Powers could not obtain by persuasion.<sup>67</sup>

62. *Id.* at 480. The details of the prolonged Constantinople Conference (Dec. 27, 1876-Jan. 20, 1877), clustered around nine protocols; *Id.* at 400-93. *See also* 32 DAS STAATSARCHIV Nos. 5964-71, at 15-33 (H. v. Kremer-Auenrode & P. Hirsch eds. 1877) (compilation of 19th century German archival material) [hereinafter DAS STAATSARCHIV].

63. E. ENGELHARDT, *supra* note 34, at 178. For the French text of the Protocol, see G. NORADOUNGHIAN, *supra* note 36, at 496, and A. SCHOPFF, *supra* note 25, Doc. No. 45, at 34.

64. *Id.*

65. *Id.*

66. The quotation is from British Foreign Minister Derby's Apr. 9, 1877 communication to his Chargé in Constantinople. DAS STAATSARCHIV, *supra* note 62, No. 6360 at 156-57; *see also* E. ENGELHARDT, *supra* note 34, at 179 (April 9, 1877 circular by Ottoman Foreign Minister Safvet, decrying Europe's stance of "humiliating protectorship.")

67. Commenting on this resort to war, a British historian, J. Marriott, declared: "Russia had behaved, in face of prolonged provocation, with commendable patience and restraint, and had shown a genuine desire to maintain the European Concert. The Turk had exhibited throughout his usual mixture of shrewdness and obstinacy." J. MARRIOTT *supra* note 59, at 333.

Defeated on both the Caucasian and the Balkan fronts in less than a year, Turkey sued for peace and had to submit to the humiliating and debilitating terms of the March 3, 1878 San Stefano Treaty dictated by Russia. Led by England and Austria, the five Concert Powers objected to their exclusion from this treaty, and impelled Russia to reconsider and redraw the terms in a manner consistent with the provisions of articles 9 and 12 of the 1856 Paris Peace Treaty. The result was the July 13, 1878, Treaty of Berlin through which three Christian nationalities in the Balkans (Serbia, Rumania, and Montenegro) were granted the status of independent states, with Bulgaria gaining autonomy under Ottoman suzerainty. The treaty also accorded Eastern Roumelia, south of the Balkan mountains, a special arrangement under the Ottoman government—a Christian governor approved by the Powers—and projected special reforms for Macedonia.<sup>68</sup>

## 2. *The Lethal Disjunctiveness of Public Law and Common Law in Ottoman Turkey*

Although the Great Powers' recourse to humanitarian intervention helped introduce some rules of conduct in international relations,<sup>69</sup> they

68. *Id.* at 341-46. For the English text of the Berlin Treaty, ratified in Berlin on Aug. 3, 1878, and the Ottoman ratification on Aug. 28, 1878, see Great Britain, 83 *Parl. Papers* 690-705 (1878). For the selective reproduction of the minutes of the proceedings involved, see also DAS STAATSARCHIV, *supra* note 62, Nos. 6766-73, at 226-81. For the text of the Treaty in French, the original language used, see *id.* No. 6773, at 277-91. For the San Stefano Treaty see *id.* No. 6718, at 38-48. For the text of articles 58-63 of the Treaty of Berlin, see J. HUREWITZ, *supra* note 25, at 189-91. Noradounghian also includes the French text of the San Stefano Treaty. 3 G. NORADOUNGHIAN, *supra* note 36, at 509-21. Though in 1905 the Powers imposed upon Turkey a clause providing for European control of reforms in Macedonia, they relinquished it following the 1908 Young Turk Revolution as a gesture of faith to the new government.

Marriott characterized the Treaty of Berlin "as a great landmark in the history of the Eastern Question." J. MARRIOTT, *supra* note 59, at 345. Mandelstam, a Russian legal scholar, extolled the 1877-1878 Russo-Turkish war, producing that treaty, as "*une véritable guerre d'humanité*," describing the clauses of the Berlin Treaty as punishment of Turkey for violating the terms of the Paris Peace Treaty, and the Treaty itself "as one of the most signal manifestations of *l'intervention collective d'humanité*" for the sake of the oppressed races of the Ottoman Empire. As to article 62 guaranteeing "civil and political rights, public employment, free exercise of the professions and industrial pursuits," irrespective of "religious differences," Mandelstam called that Article "a kind of charter of human rights." A. MANDELSTAM, *supra* note 27, at 17 & n.1, 18.

69. At the Congress of Paris, February 25 to March 30, 1856, for example, four such rules were adopted: 1. the abolition of privateering; 2. the neutral flag covers enemy goods, save contraband; 3. neutral goods, except contraband, are not liable to capture under an enemy flag; 4. blockade, to be binding, must be effective. See 1 G. HACKWORTH, *INTERNATIONAL LAW* 1-138 (1968). When Russia repudiated the Black Sea clauses of the Treaty of Paris in the Protocol of the March 13, 1871 London conference, the plenipotentiaries of Great Britain, Italy, Austria-Hungary, Germany, Russia, and Turkey declared it as "an essential principle of the law of the nations that no power can liberate itself from the engagement of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of



had little effect on the lives of non-Muslim minorities in Turkey. The Powers' interventions in Ottoman Turkey were designed to obviate domestic conflicts that were threatening peace in the region and thus, indirectly, in all of Europe. Militant Islamic nationalism, however, deflected the political possibilities for introducing successful legal reforms of the Ottoman social system. Insisting on domination as their sovereign right, the Ottoman Turks displaced the Powers' adjudicative politics through an ideology of coercion rooted in the customs and traditions of their society.<sup>70</sup>

The public laws for the equality and protection of non-Muslim minorities imposed upon Turkey bore a European-Christian stamp and conflicted with the common law principles of Ottoman society.<sup>71</sup> As a result, Islamic common law principles of supremacy for Muslims invariably preempted them. To the Powers who were wondering why the reforms had not yet materialized, Grand Vezir Fuat Paşa responded, "One wouldn't know how to improvise [methods for] the reforming of customs."<sup>72</sup> Another Grand Vezir, Ali Paşa, a cohort of Fuat, is reported to have offered the following excuse: "but in what country in the world ha[s] it been found practicable to efface in a day the effects of the habits and traditions of ages by a simple change of the law or in the disposition of the Government?"<sup>73</sup> In explaining the reasons why the reforms "failed," Professor Talcot Williams, the former Dean of Columbia University's School of Journalism, who was born and raised in Turkey, wrote, "custom (*adet*) is stronger in the East than codes, courts, and the authority, and the old customs . . . [are] still strong over much of the empire."<sup>74</sup>

Excerpts from a Memorandum which longtime Grand Vezir Resid Paşa addressed to the Sultan in the wake of the 1856 Reform Act procla-

an amicable agreement." <sup>61</sup> BRITISH AND FOREIGN STATE PAPERS, 1870-1871 1198, *cited in* J. SCOTT, CASES ON INTERNATIONAL LAW 469 (2nd ed. 1922).

70. This response reveals an underlying truth of international law. As Brierly explains: We must expand our interpretation of the term "international law." We must cease to think of it as merely a set of principles to be applied by courts of law, and understand that it includes the whole legal organisation of international life on the basis of peace and order. Such an organisation must provide for the peaceful and orderly use of *political*, as well as judicial, methods of adjustment. The predominant concern of international law with particular concrete problems. . . seems to carry the corollary. . . that political methods of adjusting awkward situations will remain. . . relatively more important than they are in the state.

Brierly, *The Rule of Law in the International Society*, 7 NORDISK TIDSKRIFT FOR INTERNATIONALT RET, ACTA SCANDINAVICA JURIS GENTIUM 3, 15 (1936).

71. See *supra* text accompanying note 36.

72. Quoted in Davison, *supra* note 39, at 853.

73. BLUE BOOK, TURKEY, *supra* note 56, No. 16 (1877); the full text of the statement is in BAT YE'OR, *supra* note 15, at 289-90.

74. T. WILLIAMS, TURKEY: A WORLD PROBLEM OF TODAY 285 (1921).

mation reveal the subversive intent of the Ottoman government. In this Memorandum, he admits that the real intent of the reforms was being concealed (*setr*) from the public by deceptive metaphors. This process was meant to avoid causing alarm and offending the cherished traditions of the Muslim populace. In questioning the wisdom of granting the non-Muslims "complete emancipation" and "perfect equality," Reşid Paşa underscored the complications he anticipated. He wondered whether a 600-year-old empire could transform its inner character into something "entirely repugnant and contrary" (*tamamıyla zıt ve muhalif*). He assured the Sultan that its declared purpose notwithstanding, the text of the Edict relies on "ingenious words" to "deceive" (*iğfal*), through "vague paragraphs," those who insisted on its proclamation.<sup>75</sup> Thus, while the European Powers' humanitarian intervention efforts accomplished some reform of Turkey's written laws, they were completely ineffectual in eliciting reform of actual practice.

### C. *The Fate of the Armenians*

The interplay of European attempts to force reforms and the Turkish resistance to cultural change set the stage for an internal Turkish response to the escalation of the Turko-Armenian conflict. In this clash, the disjunctiveness of public law and customary law described above deteriorated into a sharp conflict between the two legal domains. Taking the series of enacted reforms seriously, the Armenians pressed for their actual implementation as a matter of legal entitlement. The Turks, however, relied on their common law claims of traditional superordination. One cardinal common law principle, discussed in Section A above, refers to a rule in the *Akdî Zimmet* (contract with the ruled nationality) which stipulates cessation of hostility against non-Muslim subjects following their defeat and submission; once defeated these subjects are granted refuge and protection, or *dehalet*. By attempting to influence Turkish national policy in their favor through the intercession of foreign Powers, the Ottoman Turks argued, the Armenians had violated this fundamental

75. 1 A. CEVDET PAŞA, TEZÂKİR (Memoirs) 79 (C. Baysun ed. 1953). The significance of these statements cannot be overestimated. Reşid is generally identified as a pioneer in the Ottoman reform movement. He not only held the post of Prime Minister six times, but also that of Foreign Minister three times in the 1837-1858 period. The text of the 1839 Reform Charter is attributed to him. See F. BAILEY, *supra* note 36, at 186, 193, 205. Other sources describe him as a manipulator of the Powers, given to double-talk and equivocation, with a firm commitment to Islam and its precepts. In his famous memorandum, criticizing the abuses of Sultan Mahmud II, who had just died, he chastised the ruler for "constantly neglecting the law of the Prophet when on each such occasion he was required to obey it." *Id.* at 274. A French chronicler of the history of Reşid's tenure in various posts portrays him as conservative, interested mainly in the status quo while pretending to pursue reforms. M. DESTILHES, CONFIDENCES SUR LA TURQUIE 37-73 (1855).

treaty provision, and thus, under the prevailing common law, had forfeited their right to clemency.

The cycle of massacres preceding the World War I genocide was rationalized essentially in this fashion. In describing the scenes of the 1895 Urfa massacre and the entire 1894-1896 era of Abdul Hamit massacres, the Chief Dragoman of the British Embassy, who was fluent in Turkish and based his report on evidence supplied to him by local Muslims, wrote the following:

[The perpetrators] are guided in their general action by the prescriptions of the Sheri Law. That law prescribes that if the 'rayah' [cattle] Christian attempts, by having recourse to foreign powers, to overstep the limits of privileges allowed to them by their Mussulman masters, and free themselves from their bondage, their lives and property are to be forfeited, and are at the mercy of the Mussulmans. To the Turkish mind the Armenians had tried to overstep those limits by appealing to foreign powers, especially England. They therefore considered it their religious duty and a righteous thing to destroy and seize the lives and property of the Armenians . . . .<sup>76</sup>

This reasoning is confirmed by the contemporary Israeli historian, Bat Ye'or, as follows: the Armenian quest for reforms invalidated their "legal status," which involved a "contract." This "breach . . . restored to the *umma* [the Muslim community] its initial right to kill the subjugated minority [the *dhimmis*], [and] seize their property . . . ."<sup>77</sup>

In the recourse to massacre as a method of conflict resolution, the religious tenets of the preeminent common law destroyed the public law's efficacy. To emphasize the religious thrust of the laws, the perpetrators performed, whenever suitable, Muslim rites while killing their victims. In reference to Urfa, Lord Kinross, a British historian, provides the following example:

When a large group of young Armenians were brought before a sheikh, he had them thrown down on their backs and held by their hands and feet. Then, in the words of an observer, he recited verses of the Koran and 'cut their throats after the Mecca rite of sacrificing sheep.'<sup>78</sup>

76. FO 195/1930, folio 34/187.

77. BAT YE'OR, *supra* note 15, at 48, 67, 101.

78. LORD KINROSS, *THE OTTOMAN CENTURIES* 560 (1977). The passage, more fully, is as follows:

[The massacre's] objective, based on the convenient consideration that Armenians were now tentatively starting to question their inferior status, was the ruthless reduction, with a view to elimination of the Armenian Christians, and the expropriation of their lands for the Moslem Turks. Each operation, between the bugle calls, followed a similar pattern. First the Turkish troops came into a town for the purpose of massacre; then came the Kurdish irregulars and tribesmen for the purpose of plunder. Finally came the holocaust, by fire and destruction, which spread, with the pursuit of the fugitives and mopping-up operations, throughout the lands and villages of the surrounding province. This murder-

This lethal disjunction between public and common laws in the Ottoman system was predicted by Grand Vezir Reşid. In the above cited Memorandum of 1856, Reşid foresaw the possibility of "a great slaughter" (*bir mukateleyi azîme*) in connection with efforts to establish equality through the enactment of public laws.<sup>79</sup>

1. *The Failure of International Intervention on Behalf of the Armenians*

Although the European powers had repeatedly forced Turkey to publicly proclaim equality for its non-Muslim subjects, they were unwilling or unable to force the Ottomans to honor such promises. As seen above, Turkey had many opportunities to make good on its agreements, but inevitably failed to do so. By 1878, when the Treaty of Berlin was signed, the Armenian Question had ceased to be a merely domestic problem for the Ottoman Empire. Article 61 of that treaty read:

The Sublime Porte undertakes to carry out, without further delay, the ameliorations and reforms demanded by local requirements in the provinces inhabited by the Armenians, and to guarantee their security against the Circassians and the Kurds . . . . It will make known periodically the steps taken to this effect to the Powers, who will superintend their application.<sup>80</sup>

Commenting on the significance of this clause and article 62 of the treaty—which provided for religious liberty, civil and political rights, and admission to the public employments, functions and honors—Rolin-Jaequemyns asserted that the Armenians were placed "*under the express protection of international law of contract, and under the control of the Great Powers*. The natural obligations of the Turkish Government have

ous winter of 1895 thus saw the decimation of much of the Armenian population and the devastation of their property in some twenty districts of eastern Turkey. Often the massacres were timed for a Friday, when the Moslems were in their mosques. . . . Cruellest and most ruinous of all were the massacres at Urfa, where the Armenian Christians numbered a third of the total population. . . . When the bugle blast ended the day's operations, some three thousand refugees poured into the cathedral, hoping for sanctuary. But the next morning—a Sunday—a fanatic mob swarmed into the church in an orgy of slaughter, rifling its shrines with cries of "Call upon Christ to prove Himself a greater prophet than Mohammed." Then they amassed a large pile of straw matting, which they spread over the litter of corpses and set alight with thirty cans of petroleum. The woodwork of the gallery where a crowd of women and children crouched, wailing with terror, caught fire, and all perished in the flames. Punctiliously at three-thirty in the afternoon the bugle blew once more, and the Moslem officials proceeded around the Armenian quarter to proclaim that the massacres were over. . . . the total casualties in the town, including those slaughtered in the cathedral, amounted to eight thousand dead.

*Id.* at 559-60. The full account of the Urfa holocaust as personally investigated and reported on Mar. 16, 1896, by Gerald H. Fitzmaurice, British Consul and Dragoman, is in FO 195/1930 at 30-72 (folios 185-206).

79. 1 A. CEVDET PAŞA, *supra* note 75.

80. M. ROLIN-JAEQUEMYNS *supra* note 35, at 38-39.

become . . . as regards the Armenians, *strict engagements* with the States which are parties to the Treaty . . . .”<sup>81</sup> In reality, however, not only were the Armenians denied protection, but their physical security deteriorated. They suffered a string of massacres in 1894-1897. These massacres were perpetrated “at a time when the regime was hard pressed by European powers and was afraid of external intervention . . . .”<sup>82</sup> The estimated number of victims ranged from 100,000 to 200,000.<sup>83</sup>

Three sets of circumstances accommodated the process of deterioration leading to these massacres: the subversion of public law by the Turkish authorities, the lack of unity among the European Power to ensure the adherence by the Turks to the public laws, and the lack of any national ties between the Armenians and the European Powers.

### a. *Continued subversion of public law*

As in the case of the previous reform acts of 1839 and 1856, and the 1876 Constitution, the Berlin Treaty clauses regarding the treatment of nationalities and minorities remained dead letters. Their formal enactment was a measure of expediency, intended to forestall more drastic initiatives on the part of the Powers. In a dispatch to Berlin, Prince Radolin, the German Ambassador, informed his Chancellor of a conversation with Sultan Abdul Hamit. During that exchange, “he [the Sultan] most solemnly swore to me that under no circumstances would he yield on the matter of ‘the unjust’ Armenian reforms.”<sup>84</sup> Moreover, the Ottoman system was ill-suited to extend equality to the Armenians, either socially, politically, or legally. As the prominent late Harvard historian William Langer concluded, “It was perfectly obvious that the Sultan was

81. *Id.* at 38(emphasis in original).

82. Melson, *A Theoretical Inquiry into the Armenian Massacres of 1894-1896*, 24 COMP. STUD. IN SOC'Y & HIST. 507 (1982).

83. Kaiser Wilhelm II informed British Chargé Colonel Swaine in Berlin that up to Dec. 31, 1895, approximately 80,000 Armenians had been slain (*umgebracht*). DAS TÜRKISCHE PROBLEM 1895, 10 DIE GROSSE POLITIK DER EUROPÄISCHEN KABINETTE 1871-1914, Doc. No. 2572, at 251 (transcript of Kaiser's dictation)(J. Lepsius, A. Bartholdy, & F. Thimme eds. 3rd ed. 1927). British ambassador White, however, estimated 100,000 victims up to early December 1895. 10 DIE GROSSE POLITIK DER EUROPÄISCHEN KABINETTE 1871-1914, Doc. No. 2479, Report No. 233, at 127. Lozé, the French ambassador at Vienna, cited the combined figure of 200,000 to cover those actually killed as well as those expected to perish from “hunger and cold during the coming winter.” FRENCH FOREIGN OFFICE, 12 DOCUMENTS DIPLOMATIQUES FRANÇAIS 1871-1900 Doc. No. 256 at 384 (1951) [hereinafter DOCUMENTS DIPLOMATIQUES]. German Turkophile and Foreign Office operative Jäckh estimates the number of Armenian victims of Hamit as follows: 200,000 killed, 50,000 expelled, and 1 million pillaged and plundered. E. JÄCKH, DER AUFSTIEGENDE HALBMOND 139 (Berlin 6th ed. 1916).

84. DER NAHE UND DER FERNE OSTEN, 9 DIE GROSSE POLITIK DER EUROPÄISCHEN KABINETTE 1871-1914, Doc. No. 2184, at 203 (J. Lepsius, A. Bartholdy & F. Thimme eds., 3d ed. 1927).

determined to end the Armenian question by exterminating the Armenians.”<sup>85</sup>

b. *Lack of cohesion among the European Powers*

The European interventions historically hinged upon a modicum of consensus among the Great Powers. Until the 1878 Berlin Treaty, the unified insistence of England and Russia, the dominant Powers in the Concert of Europe, could induce, if not compel, Turkey to submit to some degree of intervention by the Powers.<sup>86</sup> However, this line of cooperation was not exclusive of rivalries on many other levels; nor were these interventions purely “humanitarian.”<sup>87</sup> But the Treaty of Berlin ushered in a period of increasingly acute distrust between Russia and England, thus ensuring the gradual collapse of the Concert of Europe. The necessity of cooperation among the Powers, and the ever-present

85. W. LANGER, 1 *THE DIPLOMACY OF IMPERIALISM 1890-1902* 203 (1935).

86. The cooperation of these two Powers started with the Apr. 4, 1826 St. Petersburg Protocol in which they agreed to mediate between the Turks and Greeks on the basis of complete autonomy for Greece under Turkish suzerainty. See J. MARRIOTT, *supra* note 59, at 214. The July 6, 1827 Treaty of London which under the name of “humanitarian intervention,” threatened Turkey with military support for Greece, was likewise initiated jointly by Britain and Russia. *Id.* at 218. The December 1876 Constantinople Conference, at which the Powers insisted on European control and supervision of Ottoman reforms, was the consequence of Anglo-Russian agreement as to the terms of the projected peace between Salisbury and Ignatiev, the respective plenipotentiaries. BLUE BOOK, TURKEY, *supra* note 56, No. 1, (1877), Doc. No. 1053, at 719. The July 13, 1878 Berlin Treaty followed a secret Anglo-Russian Agreement (May 30, 1878) engineered by Shuvalof, the Russian ambassador to Britain. *ENCYCLOPEDIA OF WORLD HISTORY* 735-36 (W. Langer rev. ed. 1948) The Anglo-Russian accords on major issues were thus crucial to the Concert of Europe’s united action bringing pressure upon the Ottoman authorities.

87. In the Gentlemen’s Agreement of 1844, Tsar Nicholas I proposed a joint action for the disposition of the Ottoman Empire in the event of its collapse, which was then anticipated. Nine years later, during discussions with Lord Seymour the Tsar described the Ottoman Empire as “the sick man,” and bid for its partition. DAS STAATSARCHIV, *supra* note 62, No. 5612, at 167 and No. 5613, at 169. In the July 8, 1876 Reichstadt Agreement, Russia and Austria laid out contingency plans involving territorial acquisitions in the event the Turks should suffer defeat at the hands of the Serbs and Montenegrins. 3 *DIE GROSSE POLITIK DER EUROPÄISCHEN KABINETTE 1871-1914*, *supra* note 84, No. 605, at 293 (1926); *ENCYCLOPEDIA OF WORLD HISTORY*, *supra* note 86, at 734. In the January 15, 1877 Budapest Convention between Russia and Austria, similar plans were devised for disposing of Turkish territories. *Id.* at 735. Most importantly, Austria was given a mandate to occupy Bosnia and Herzegovina and to garrison the district of Novi Bazar, a strip between Serbia and Montenegro; similarly, in a secret Anglo-Turkish agreement, Great Britain took Cyprus from Ottoman dominion. For the French text of the agreement see 3 G. NORADOUNGHIAN, *supra* note 36, vol. 3, at 522-25 (1902). For the English text see E. HERTSLET, *supra* note 45, at 2721-22. All these events were directly connected to the Treaty of Berlin. To the Russians, the benefits of victory in the 1877-1878 conflict were minimal enough to plant in their minds the seeds of bitterness toward Great Britain that lasted for decades.

suspicion of ulterior motives,<sup>88</sup> are limitations inherent in the principle of multilateral intervention, whether humanitarian or not.

These limitations became distinct liabilities for the Armenians, as European concern for Turkey's implementation of article 61 of the Berlin Treaty lessened and eventually evaporated in the face of the Anglo-Russian rivalry and suspicion.<sup>89</sup> While England appeared willing to intercede if joined by the other Powers,<sup>90</sup> France supported Russia's adamant

88. See Kunz, *The United Nations Convention on Genocide*, 43 AM. J. INT'L L. 742 (1949) (discussing Lauterpacht's view of the subversion of humanitarian intervention for "selfish purposes").

89. These rivalries found expression in the British challenge to the provisions of article 16 of the San Stefano Treaty in which Russia had acquired the right to continue to occupy the eastern (primarily Armenian) provinces of Turkey, which they had conquered through the 1877-1878 Russo-Turkish war, until Turkey had carried out the reforms she had promised. Considering the presence of Russian troops in that region a threat to British colonial interests in India, Disraeli went through the motions of preliminary mobilization to signal to Russia his intent to wage war, if necessary, to force Russian withdrawal. This British maneuver directly affected Armenia, as Lloyd George outlined:

Had it not been for our sinister intervention, the great majority of the Armenians would have been placed, by the Treaty of San Stefano in 1878, under the protection of the Russian flag.

The Treaty of San Stefano provided that Russian troops should remain in occupation of the Armenian provinces until satisfactory reforms were carried out. By the Treaty of Berlin (1878)—which was entirely due to our minatory pressure and which was acclaimed by us as a great British triumph which brought "Peace with honour"—that article was superseded. Armenia was sacrificed on the triumphal altar we had erected. The Russians were forced to withdraw; the wretched Armenians were once more placed under the heel of their old masters, subject to a pledge to "introduce ameliorations and reforms into the provinces inhabited by Armenians." We all know how these pledges were broken for forty years, in spite of repeated protests from the country that was primarily responsible for restoring Armenia to Turkish rule. The action of the British Government led inevitably to the terrible massacres of 1895-97, 1909, and worst of all to the holocausts of 1915. By these atrocities, almost unparalleled in the black record of Turkish misrule, the Armenian population was reduced in numbers by well over a million.

Having regard to the part we had taken in making these outrages possible, we were morally bound to take the first opportunity that came our way to redress the wrong we had perpetrated, and in so far as it was in our power, to make it impossible to repeat the horrors for which history will always hold us culpable.

When therefore in the Great War, the Turks forced us into this quarrel, and deliberately challenged the British Empire to a life and death struggle, we realised that at last an opportunity had been given us to rectify the cruel wrong for which we were responsible. 2 D. LLOYD GEORGE, *MEMOIRS OF THE PEACE CONFERENCE* 811 (1939). During the Nov. 18, 1918, Parliamentary debates in the House of Commons, Aneurin Williams raised the same question, declaring,

This country owes a debt to Armenia, because, after all, we more than forty years ago prevented Armenia from being released by Russia from Turkish tyranny. If we had not done that, the awful sufferings which have occurred since would not have occurred. We, therefore, owe them a debt. We owe them a further debt because they have fought valiantly for us in this War.

ARMENIA, *PARLIAMENTARY DEBATES* (House of Lords, Nov. 13, 1918, House of Commons, Oct. 23, 24, 30, 31, Nov. 6, 7, 12, 14, 18, 1918) 16-17 (A. Raffi ed. 1918).

90. The tenuous character of this willingness bordered on deception. Diplomatic records highlight the incidence of frivolous party politics carried out under the guise of "humanitarian intervention." The British handling of the Armenian Question exemplified the influence of

opposition to such intercession. Germany was even more reluctant to act on behalf of the Armenians; but unlike the other Powers, she did not equivocate about her posture. Bismarck, who tried to dissuade England from interfering in "the internal affairs" of Turkey, articulated that exercise of *Realpolitik* with brutal frankness. In a dispatch dated May 17, 1883 to his Ambassador in London, Bismarck deprecated

the so-called "Armenian Reforms" [as] ideal and theoretical efforts constituting the ornamental part of the [Berlin] Congress. Their practical significance is of very doubtful value and for the Armenians means [a] double-edged [sword] . . . I cannot join Lord Dufferin [British Ambassador to Turkey] in a policy which sacrifices its practical goals to a temporary philanthropic halo.<sup>91</sup>

Apprised of Bismarck's policy, which amounted to a deliberate derogation of article 61, British Foreign Affairs Minister Granville two years earlier had ordered Ambassador Goschen at Constantinople to cease to pursue the Armenian Question "in consequence of the objections raised by the German Government."<sup>92</sup> Kaiser Wilhelm II ratified the Bismarckian attitude regarding the Armenian reforms when he subsequently declared that "the Berlin Congress was a mistake that entailed grave consequences. I will never agree to the convening of a second one."<sup>93</sup> Austria eventually joined these Powers in defining the stipulated reforms as moribund and inherently full of "hidden complications for the Powers."<sup>94</sup> For a variety of reasons, the Powers thus abdicated the responsibilities they had assumed as signatories to the Treaty of Berlin.

The vague and imprecise terms of the Treaties of Paris and Berlin also allowed the Powers to hedge and to disclaim responsibility. For exam-

domestic party squabbles on foreign policy, pitting the Gladstonian liberals against the conservatives represented by Disraeli, and subsequently by Salisbury. In dismissing Gladstone's fervent pronouncements in support of efforts to extricate subject races from the Ottoman yoke, for example, Disraeli denounced Gladstone as "an unprincipled maniac, extraordinary mixture of envy, vindictiveness, hypocrisy. . . never a gentleman." A. MAUROIS, *supra* note 60, at 310.

This overall judgment seems to be corroborated in part by the statement of William Summers, a liberal M.P. (and a colleague of Gladstone) who, during a brief visit in Constantinople in 1890, met with some diplomats. In his Sept. 28, 1890 report to his Chancellor in Berlin, German Ambassador Radowitz, after describing Summers as "the most energetic supporter of the Armenian cause in England," quoted Summers as follows: "Gladstone and I are involved in the Armenian Question for the sole purpose of causing difficulties to the Salisbury Cabinet." 9 DIE GROSSE POLITIK DER EUROPÄISCHEN KABINETTE 1871-1914, *supra* note 84, Doc. No. 2178, at 194.

91. *Id.* Doc. No. 2183, at 200 n.\*.

92. BLUE BOOK, TURKEY, *supra* note 56, No. 6 (1881), Report No. 170, Feb. 10, 1881, at 322.

93. 9 DIE GROSSE POLITIK DER EUROPÄISCHEN KABINETTE 1871-1914, *supra* note 84, Doc. No. 2464, Kaiser's marginalia at 114, n.5.

94. DOCUMENTS DIPLOMATIQUES, *supra* note 83, Doc. No. 248 at 371.



ple, article 9 of the Paris Treaty stipulated reforms while prohibiting any intervention, "either collectively or separately," in the internal affairs of Turkey. The imprecision of the word "superintend," inserted into the last paragraph of article 61 of the Berlin Treaty, compounded the treaty's ambivalence. The specific functions of superintendence were left undefined, allowing any signatory to argue that the Powers were contractually responsible only to each other and to no one else. Thus, in practice, the reforms were left unmonitored. Moreover, article 61 implicitly proscribed unilateral action by any of the signatory Powers through the use of the corporate term "the Powers."<sup>95</sup> Sultan Abdul Hamit (1876-1908), whose name and regime are associated with the nineteenth-century Armenian massacres, understood the reluctance of the Powers to intervene actively on behalf of the Armenians and appreciated their proclivity to take refuge in the imperfections of the Treaty clauses involved.<sup>96</sup> The Powers' only reaction to the massacres was to remonstrate Turkey and issue ambiguous threats.

### *c. The Armenians' lack of a tie to any European power*

The Armenians failure to obtain the national emancipation that was achieved by other non-Muslim nationalities under Ottoman rule was also a direct result of their lack of tutelage and active sponsorship by any of the European Powers. The Slavic nationalities—the Serbs, the Bulgars,

95. As England's Duke of Argyll noted, "What was everybody's business was nobody's business." G. CAMPBELL (DUKE OF ARGYLL), *OUR RESPONSIBILITIES FOR TURKEY* 74 (1896). British scholar Dawson reasserted this point nearly thirty years later: "No solemn international covenant has been so systematically and openly infringed and ignored, in part by the Signatory Powers themselves, as the Treaty which was concluded in Berlin in July, 1878, 'in the name of Almighty God.'" W.H. DAWSON, III, *THE CAMBRIDGE HISTORY OF BRITISH FOREIGN POLICY* 143 (1923).

96. Commenting on the impact of this European stance, noted British historian Gooch wrote,

The [European] Concert was dead . . . it became clear that pressure without the intention of resorting to force stiffened rather than weakened the resistance of the Sultan, who had no intention of allowing Armenia to go the way of Bulgaria . . . The lamentable result of the fitful interest shown by the Powers was to awaken the hopes in the Armenian highlands which could not be fulfilled, and to arouse suspicions in the breast of the Sultan which were to bear fruit in organized massacre and outrage in the days to come. G.P. GOOCH, *HISTORY OF MODERN EUROPE 1878-1919* 22-23 (1923). In a speech in the British Parliament, Lord Salisbury, later Foreign and Prime Minister of England noted skeptically, "[w]hether it ever will be possible to induce the six Powers to agree together to use, not diplomatic pressure, but naval and military force, I very much doubt . . . I am sure nothing can be gained by a compromise between the two . . ." *TIMES* (London), Oct. 24, 1890; M. MAC-COLL, *THE SULTAN AND THE POWERS* 291 (1896). The standard Turkish reaction to threats of the use of force was the raising of the specter of general massacre against the entire nationality in the given provinces. In the 1860 French intervention in Lebanon, French Foreign Minister M. Thouvenel dismissed this threat stating, "[i]f such reasoning were once to be admitted, it would be put forward on every occasion when an abuse was to be corrected in Turkey." *Id.* at 34.

and the Montenegrins—enjoyed Russian guardianship because of their racial and ethnic kinship. Religious ties through the Eastern Orthodox Church account for the Russian guardianship of the Greeks and the Rumanians of Wallachia. The French, for their part, virtually rescued the Catholic Maronites of Lebanon by invading Lebanon and compelling the Turks to give the Maronites limited autonomy. The Armenians, however, did not enjoy sufficient religious or ethnic bonds to any European power to warrant similar treatment.

Further, the “ingratitude” of the nationalities who had benefited from outside intervention reduced the Armenians’ chance of receiving similar assistance. Bulgaria, for example, thwarted Russian attempts at control, despite the active Russian support it received in obtaining freedom. After that experience, the Tsars not only studiously dissociated themselves from the Armenians but, during the reign of Abdul Hamit, tacitly supported the Turkish persecution of the Armenians. The Russians explained their behavior as a way to avoid the emergence of a second Bulgaria on their border.<sup>97</sup> Frank Lascelles, the British Ambassador at St. Petersburg, quoted Russian Foreign Minister Lobanof as declaring that he was decidedly opposed to seeing the rise in the proximity of Russian territory of “another Bulgaria.”<sup>98</sup>

Another factor separating the Armenians from other Ottoman subject nationalities involved geo-political considerations. All the other nationalities for whom the European powers intervened were located on the periphery of the Ottoman Empire, whereas Armenia’s historical location caused it to be regarded as a threat to the Turkish heartland. Logistical difficulties involved in providing assistance, such as Armenia’s lack of ports for British vessels, further compounded the problem.<sup>99</sup>

97. Soon after the Treaty of Berlin, Bulgaria, the protégé of the Russians, was reduced to a pawn in Russian hands. Russian officers and officials descended on Bulgaria’s capital in a swarm and reduced the country to a Russian province. Any complaint was branded as “ingratitude.” Growing discontent, attended by anti-Russian sentiments, led to the 1881 overthrow of the regime. Russia responded by appointing Russian generals, who took their orders directly from the Tsar, and “Russian generals were appointed to the Interior, War, and Justice.” Nationalists in Bulgaria subsequently coined the phrase “Bulgaria for the Bulgarians.” These are the conditions under which Bulgarian “ingratitude” arose and crystallized. G.P. GOOCH, *supra* note 96, at 3-6.

98. Quoted from a dispatch to London on May 13, 1895, BLUE BOOK, TURKEY, *supra* note 56, No. 1 (1896), Doc. No. 83, at 83.

99. Russia was the only power that felt capable of overcoming the logistical difficulties involved in rescuing the Armenians from Ottoman bondage. Russian policy on this matter of conflict between territorial sovereignty of the state and the principle of humanitarian intervention was articulated by Russian Foreign Minister Alexander Gorchakof who in a November 7, 1876 dispatch to Count Paul Shuvalof, Russian Ambassador to Berlin, stated, “if the Great Powers wish to accomplish a real work. . .it is necessary. . .to recognize that the independence and integrity of Turkey must be subordinated to the guarantees demanded by humanity, the sentiment of Christian Europe and the general peace.” BLUE BOOK, TURKEY, *supra* note 56, no.1 (1877), no.1053, at 90. But as British author Pears noted, “Armenians were to be pro-

The Armenians were also hindered because they lacked the geographic concentration of the Balkan nationalities. The Turks had redistricted the Armenians to reduce them to numerical minorities, especially in such regions of historic Armenia as the provinces of Erzurum, Van, and Bitlis; additionally, a significant portion of the Armenian population seeking relief from depredations (as well as in a quest for economic opportunities) resorted to internal migration. The resulting geographic dispersion diluted any idea of a concrete Armenian state analogous, perhaps, to Greece or Bulgaria.

### 2. *The Use of Rising Armenian National Awareness as an Excuse for Liquidation*

The international efforts of the European Powers may in fact have caused the Armenians more harm than good. By raising the consciousness and hope of the oppressed peoples within Turkey, without concurrently enhancing their power, international actors created a situation in which the Ottomans had both the incentive and the excuse for the final resolution of the "Armenian problem." Encouraged by the promises of the Treaty of Berlin, the Armenians experienced a new sense of national consciousness, which in turn engendered rising expectations. Sporadic displays of assertiveness began to erode their tradition of passively enduring the abuses endemic to the Ottoman system. Additionally, emigré Armenian intellectuals formed committees in the capitals of Europe to protest these abuses and to push for the implementation of the promised reforms. As the Ottoman regime resisted these agitations and refused to execute the reforms in any meaningful way, Armenian revolutionary cells emerged within and without the Empire and prepared for combat.

In a report to Paris entitled *Exposé historique de la question arménienne*, long-time French Ambassador Paul Cambon traced the genesis of the "Armenian question" to this period. He wrote:

A high ranking Turkish official told me, "the Armenian question does not exist but we shall create it." . . . Up until 1881 the idea of Armenian independence was non-existent. The masses simply yearned for reforms, dreaming only of a normal administration under Ottoman rule. . . . The inaction of the Porte served to vitiate the good will of the Armenians. The reforms have not been carried out. The exactions of the officials remained scandalous and justice was not improved . . . from one end of the Empire to the other, there is rampant corruption of officials, denial of justice and insecurity of life. . . . The Armenian diaspora began denouncing the administrative misdeeds, and in the process managed to transform the condition of

tested if they would abandon their national Church and become formally united with the Russian faith, but not otherwise." Pears, *Turkey, Islam, and Turanianism*, 14 CONTEMP. REV. 373 (1918).

simple administrative ineptness into one of racial persecution. It called to the attention of Europe the violation by the Turks of the Treaty of Berlin and thereby summoned up the image of Armenian autonomy in the minds of the Armenian population. France did not respond to the Armenian overtures but the England of Gladstone did: The Armenian revolutionary movement took off from England<sup>100</sup> . . . as if it were not enough to provoke Armenian discontent, the Turks were glad to amplify it by the manner in which they handled it. In maintaining that the Armenians were conspiring, the Armenians ended up engaging in conspiracy; in maintaining that there was no Armenia, the Armenians ended up conjuring the reality of her existence. . . . The harsh punishment of conspirators, the maintenance in Armenia of a veritable regime of terror, arrests, murders, rapes, all this shows that Turkey is taking pleasure in precipitating the events [in relation to] an inoffensive population. In reality the Armenian Question is nothing but an expression of the antagonism between England and Russia. . . . Where does Armenia begin, and where does it end?<sup>101</sup>

Later in the report Cambon prophetically questioned the reasonableness of transporting the Armenians to Mesopotamia, a solution the Ottoman government was reportedly contemplating. Mesopotamia would later serve as the valley of the Armenian genocide.

### 3. *The Rise of the Ittihadists and the Decision to "Liquidate" the Armenians*

The transition in July, 1908, to a new regime in Turkey through a bloodless revolution that deposed Sultan Abdul Hamit and installed the Ittihadists (also known as the Young Turks) only compounded the problems of domestic conflict in general and the Turko-Armenian conflict in particular. Though their regime (1908-1918) was dubbed the Second Era of the Constitution, the Young Turk Ittihad leaders, like their predecessor, Abdul Hamit ("the Red Sultan"), embraced violent measures against the minorities on whose behalf the Powers had again begun to intercede. Their policy of repression helped spark the 1912 Balkan war and later played a role in the adoption of nationalist policies that plunged Turkey into World War I. As Marriott stated,

100. In an exchange with his German colleague Saurma, Russian Ambassador Nelidof commented that the Armenians were frustrated not only by the lack of any tangible results from European intervention, but also by the ensuing massacres. 10 DIE GROSSE POLITIK DER EUROPÄISCHEN KABINETTE 1871-1914, *supra* note 83, Doc. No. 2426, at 69. See also *supra* note 90.

101. 11 DOCUMENTS DIPLOMATIQUES, *supra* note 83, Doc. No. 50 (Feb. 20, 1894) at 71-74 (1947); see also LIVRE JAUNE. Affaires Arméniens. *Projets de réformes dans l'Empire Ottoman 1893-1897*. Doc. No. 6, at 10-13 (1897).

The Young Turk revolution brought matters to a head. [That undertaking] was in fact a last effort of the Moslem minority [in the Balkans<sup>102</sup>] to retain its ascendancy in the face of growing resistance on the part of subject races and impending European intervention. The revival of the constitution was little more than an ingenious device for appeasing Liberal sentiment abroad while furnishing a pretext for the abrogation of the historic rights of the Christian nationalities at home.<sup>103</sup>

At the 1910 annual Ittihadist Congress at Saloniki, the secret discussions outside the formal sittings revolved around the plan for the coercive homogenization of Turkey, euphemistically called "the complete Ottomanization of all Turkish subjects."<sup>104</sup> British Ambassador Lowther observed that "[t]o them 'Ottoman' evidently means 'Turk' and their present policy of 'Ottomanization' is one of pounding the non-Turkish elements in a Turkish mortar."<sup>105</sup> Surveying the thrust of these decisions, the British Foreign Office in a report employed the words "to level," with the forecast that "the Young Turks will endeavor to extend the 'levelling' system to the Kurds and the Arabs."<sup>106</sup> In a series of reports based on "authentic documents" furnished by confidential sources, the French Consul at Saloniki informed his Foreign Ministry in Paris that the Young Turks decided to employ force and violence, including massacres, as a last resort for the resolution of nationality conflicts.<sup>107</sup>

102. The British Foreign Office in 1910 estimated that as a national rather than a religious group, "the Turkish element only numbers some 6,000,000 in an Empire of 30,000,000. Under a real constitutional regime it would be swamped, more especially as it is inferior to the majority in intelligence, instruction, and business qualities. It can only maintain its position by the army and by the method [of repression]." FO 424/250, *Turkey*, Annual Report 1910, at 4.

103. J. MARRIOTT, *supra* note 59, at 443-44.

104. FO 195/2359, folio 276.

105. 9 BRITISH DOCUMENTS ON THE ORIGINS OF THE WAR 1889-1914, part 1, Doc. No. 181, Sept. 6, 1910 report, at 207 (Gooch & Temperley eds. 1926).

106. FO 424/250, Annual Report 1910, at 4.

107. M. CHOUBLIER, *LA QUESTION D'ORIENT DEPUIS LE TRAITÉ DE BERLIN* (1889). In his Nov. 15, 1910 report, quoting Halil, the head of the parliamentary branch of the party comprising Ittihadist deputies, Consul Choublier mentions the proposal of relying "solely on military might" in order to deal with the nationalities. 8 N.S. *TURQUIE* (Politique Interieure, Jeunes Turcs) 149. In his November 16 report, the Consul revealed a divergence of opinion as to the choice between "deportation" and "massacre" in handling the problem of Macedonia and the Bulgarians in Adrianople (Edirne). *Id.* at 150. According to the highly confidential information supplied to him (Nov. 16, 1910 report), the Monastir branch opted for the deportation to Asiatic Turkey of parts of the Christian population of Macedonia to be supplanted by Muslim refugees, whereas the Adrianople branch opted for the massacre of the resident Christian population (*l'extermination de tous les chrétiens hostiles à la jeune Turquie*), should the implanting of large bodies of Muslim immigrants fail to attain the desired results. In the Nov. 17 report he speaks of the resolve of Ittihad to resort to "*la force des armes*" if efforts "to achieve peacefully the unity of Turkey should fail. . .for which purpose we should develop the patriotism of the Turks." *Id.* at 151. All these disclosures are confirmed by the Dean of Turkish historians who stated that, weary of the protracted Turko-Armenian conflict, Ittihad would turn to the army to resolve the conflict by force of arms. 2:4 Y. BAYUR, *TURK INKILÂBI TARIHI* (The History of the Turkish Revolution) 13 (1952).

A final clue to understanding this repudiation of social and political reform is found in a secret speech by Talat, who was the preeminent Young Turk leader and Interior Minister. He delivered the speech to a conclave of Ittihad leaders assembled in Saloniki in August 1910 for a pre-Congress strategy meeting. Austrian, French and British intelligence sources in that city confirmed the occurrence of this meeting and the authenticity of the speech. The British Vice Consul at Monastir, Arthur Geary, vouched for "the accurate reproduction of the gist of Talat's discourse" as it was obtained from "an unimpeachable source." The relevant portion reads:

You are aware that by the terms of the Constitution equality of Mussulman and Ghiaur [infidel, a derogatory label applied to non-Muslims] was affirmed but you one and all know and feel that this is an unrealizable ideal. The Sheriat [the religious laws of Islam], our whole past history and the sentiments of hundreds of thousands of Mussulmans and even the sentiments of the Ghiaurs themselves . . . present an impenetrable barrier to the establishment of real equality. . . . There can therefore be no question of equality until we have succeeded in our task of Ottomanizing the Empire.<sup>108</sup>

The homogeneous Ottoman society Talat envisioned as a precondition for real equality thus required the liquidation in one form or another of the existing heterogeneous elements. In confirming the authenticity of that speech, a fourth source, a French diplomat, spoke of the Ittihad resolve to "deracinate" (*déraciner*) the bases of nationalistic tendencies and to "deform" the nationalities themselves.<sup>109</sup>

108. BRITISH DOCUMENTS ON THE ORIGINS OF THE WAR 1889-1914, *supra* note 105. Confirmation of the speech is in Austrian Vice Consul von Zitzkovsky's No. 69 "secret" report of Oct. 14, 1910, in A.A. TÜRKİ 159 No. 2, Bd.12, A18643. French confirmation is in 7 N.S. TURQUIE at 92-97. A particular additional phrase in this French version, not found in the British report, is Talat's proposal to lull the potential victims of the Ottomanization program to complacency: "*il faut que nous tranquillisons nos voisins.*" This report is stamped "received" by the Direction Politique et Commerciale of the French Foreign Ministry, bearing the symbols D, Carton 391, and the date Aug. 6, 1910, thus indicating that it was wired on the very same day on which the speech was delivered.

109. This source was the French chargé at distant Hidjaz in Arabia, who was reporting to Pichon, the French Foreign Minister. 7 N.S. TURQUIE, Jan. 26, 1911.

Two prominent Turkish sociologists both confirm and explain the inevitability of this decision of Ittihad to resort to the violent elimination of non-Turkic nationalities. One concluded that Ittihad meant to "assimilate them through coercive methods, if necessary." A. YALMAN, *supra* note 23, at 101. The other, the high priest of Ittihadist ideology, traced the lingering nationality conflicts to the introduction of statutory public laws, equating Muslims with non-Muslims. In a rarely publicized internal party document written during the World War I genocide against the Armenians, bearing the title: "The Two Mistakes of Tanzimat," ideologue Ziya Gökalp lambasted the 1839 and 1856 reform edicts. Declaring them serious mistakes, he reasserted the concept of the nation of overlords (*milleti hakime*) with the watchword: "Islam mandates domination." According to the author of the book in which this document was

Within a year of taking power, the Young Turks introduced a number of constitutional changes and laws purporting to liberalize the regime. Although promulgated through the Parliament, these changes brought no relief to the minorities. In the Balkans (particularly Macedonia and Albania), in the eastern provinces with large concentrations of Armenians, and even in distant Yemen, Ottoman misrule deteriorated into bloody oppression. With the exception of the Armenians, the subject nationalities resorted to open rebellion. Many of these rebellions were successful, and the Empire, as a result, suffered further shrinkage of its territories. As one student of the Young Turks observed, the Albanians, Greeks, and the different Slavic nationalities in the Balkans one by one emancipated themselves from Ottoman dominion, and by 1913 "only the Armenians and Arabs remained" as subject nationalities.<sup>110</sup>

### II. The Initiation of the Genocide Under Cover of Turkey's Intervention in the War

Although the Armenian massacres preceding World War I were significant in many respects, they underscored two especially important facts. First, the massacres were not subjected to the test of criminal proceedings, either nationally or internationally; the resulting impunity accorded the perpetrators became a form of negative reward. Second, no deterrence materialized in anticipation of the genocide of 1915. Current international law on genocide revolves around these twin principles of

published for the first time in 1949, the document was in the possession of Ittihad party Secretary-General Midhat Şükrü Bleda. K. DURU, ZIYA GÖKALP 60-69 (1949).

110. F. AHMAD, *THE YOUNG TURKS* 154 (1969). In one particular respect the Armenians stood out among all the subject nationalities, such as the Albanians and various Arab groups, the Yemenis, the Syrians, Lebanese and Jordanians. The Armenians avoided militancy and confrontation, consistently seeking remedies through appeals and pleas which were always suffused with pledges of unswerving loyalty, while the Balkan nationalities and the Arabs resorted to rebellion to end Ottoman subjugation and attendant repression. For this display of fidelity the Armenians were characterized by Ottoman rulers as "the loyal nation" (*milleti sadıka*). S. KOCAŞ, *TARİH BOYUNCA ERMENİLER VE TÜRK-EMENİ İLİŞİKLERİ* (The Armenians Throughout History and Turko-Arminian Relations) 59, 61 (1967). Their subsequent transformation from loyal servants of the State into its militant opponents is, however, an example of the futility of entreaties and pleas applied to regimes thriving on oppression and tyranny. In a meeting with British Ambassador Sir Henry Elliot on December 6, 1876, Patriarch Varjabedian, the duly recognized religious head of the Armenians, expressed the hope that the impending Constantinople Conference would not urge the Porte to accord certain privileges to the rebel provinces (Serbs, Bulgars, Montenegrins) and to deny the same to the loyal ones (the Armenians). The Ambassador demurred, saying that the purpose of the Conference was not to scrutinize the entire Administration of Turkey but to secure peace and tranquility in those provinces whose revolts were threatening the general peace. The Patriarch retorted that if rebellion were a prerequisite for enlisting the support of European Powers, there would be no difficulty whatsoever in organizing a movement of that nature. FO 424/46, No. 336, Dec. 7, 1876 (Elliot's communication to British Foreign Minister Lord Derby).

prevention and punishment. The examination of the special case of the Armenian Genocide, in which both of these principles failed to operate, brings into question the adequacy of international law<sup>111</sup> and the efficacy of international efforts to deter genocide.

### A. *The Legal-Political Context*

Evidence suggests that Turkey's entry into World War I was substantially influenced by a desire to create a suitable opportunity to resolve once and for all certain lingering domestic conflicts. The recent literature analyzing the problems of genocide is replete with discussions recognizing this historical fact. Several of these discussions singled out the 1894-96 Abdul Hamit-era massacres as a historical antecedent of con-

111. The classification of genocide as a crime under international law in the U.N. Convention Against Genocide poses a number of difficulties in current international jurisprudence, where the principle of state sovereignty remains powerful. While a variety of new principles, doctrines, conventions, and covenants have emerged in the post-Nuremberg period and provided some help in this area, these difficulties remain substantial. Specifically, some of the obstacles to countering genocide under international law include:

- a) The fact that international law has been largely confined to the level of declaratory principles. As Cardozo explained: "International law . . . has at times . . . a twilight existence during which it is hardly distinguishable from morality or justice, until at length the imprima-tur of a court attests its jural quality." *New Jersey v. Delaware*, 291 U.S. 361, 383 (1934);
- b) The uncertainties attending the "self-executing" provisions in certain treaties which have somewhat diminished the usefulness of these treaties as legally binding instruments in municipal courts;
- c) The fact that treaties, lacking the force of legislation, often cannot effectively specify a crime, assign jurisdiction, or provide the machinery for the administration of punitive justice;
- d) The absence in international law of criminal statutes and jurisdiction;
- e) The lack of international criminal courts competent to deal with offenders.

As indicated above, however, the major impediment to successful prevention or punishment of genocide under international law are the principles of state sovereignty and *raison d'état*. These principles allow a state substantial latitude in the treatment of their own subjects and substantial immunity from extra- or supra-national jurisdiction over such actions. Lauterpacht succinctly spelled out the abuses that can emerge from this system, abuses which are by no means obsolete in our times. These abuses involve the "cruder forms of treacherous violence, brazen perfidy, and outright deceit." Lauterpacht, *The Grotian Tradition in International Law*, in *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* 21 (R. Falk, F. Kratochwil & S. Mendlowitz eds. 1985); see also Moore, *Law and National Security* in *id.*, at 47-58 (discussion of legal ramifications of national security problems with particular emphasis on U.S. government policies). Nor is the U.N. exempt from the propensity to countenance such abuses. See text accompanying *supra* note 13.

It is only recently that the crime of genocide has even been considered a crime under international law. As Willis states:

Not until 1948 would genocide . . . be clearly defined as an international crime, and in 1919 adherence to time-honored notions of sovereignty placed limitations upon the scope of traditional laws and customs of war. The Hague conventions . . . [did not deal] with a state's treatment of its own citizens. . . . From this perspective, Turkish action against Armenians was an internal matter, not subject to the jurisdiction of another government. J. WILLIS, *supra* note 12, at 157. As indicated in this paper, this deference to state sovereignty was ever-present in the international reaction to the Armenian genocide. See the exchange between U.S. Secretary of State Lansing and President Wilson during World War I, *supra* note 12.



temporary issues of genocide,<sup>112</sup> while others focus on the World War I massacres.<sup>113</sup>

### 1. *The Opportunity Factor*

Vice-Field Marshal Pomiankowski, the Austrian Military Plenipotentiary attached to the Ottoman General Headquarters during the War, alluded in his memoirs to the unabating antagonism between the Muslims and the non-Muslim nationalities. Referring to "the spontaneous utterances of many intelligent Turks," Pomiankowski conveyed their view that these conquered people ought to have been forcibly converted into Muslims, or "ought to have been exterminated (*ausrotten*)" long ago. His conclusion is noteworthy:

In this sense there is no doubt that the Young Turk government already before the war had decided to utilize the next opportunity for rectifying at least in part this mistake. . . . It is also very probable that this consideration, i.e., the intent, had a very important influence upon the decisions of the Ottoman government relative to joining the Central Powers, and upon the determination of the exact time of their intervening in the war.<sup>114</sup>

Ambassador Morgenthau, whose contacts with high-ranking Young Turk officials were more frequent and intimate than Pomiankowski's, was even more explicit in this regard:

The conditions of the war gave to the Turkish Government its longed-for opportunity to lay hold of the Armenians. . . . They criticized their ancestors for neglecting to destroy or convert the Christian races to Mohammedanism at the time when they first subjugated them. Now . . . they thought the time opportune to make good the oversight of their ancestors in the 15th century. They concluded that once they had carried out their plan, the Great Powers would find themselves before an accomplished fact and that their crime would be condoned, as was done in the case of the mas-

112. See Jacoby, *Genocide*, 4 SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT (4 REVUE PÉNALE SUISSE) 472 (1949); Cervantes Rio, *Étude sur l'Article 175 du Code Pénal Mexicain "Genocide"*, 16-17 ÉTUDES INTERNATIONALES DE PSYCHO-SOCIOLOGIE CRIMINELLE 52 (1969).

113. See A. PFLANZER, *LE CRIME DE GÉNOCIDE* 15, 18, 20 (1956); THE UNITED NATIONS WAR CRIMES COMMISSION, *HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR* 35, 45 (1948) [hereinafter WAR CRIMES COMMISSION]; S. TORIGUIAN, *THE ARMENIAN QUESTION AND INTERNATIONAL LAW* (2d. ed. 1988); Bassiouni, *International Law and the Holocaust*, 9 CASE W. INT'L. L. J. 210 (1979); Kuhn, *The Genocide Convention and State Rights*, 43 AM. J. INT'L L. 501 (1948); Kunz, *supra* note 88, at 741; Lemkin, *Genocide: A New International Crime: Punishment and Prevention*, 10 REVUE INTERNATIONALE DE DROIT PÉNAL 367 (1946); Schwelb, *Crimes Against Humanity*, 1946 BRIT. Y.B. INT'L. L. 181-82, 198; Stillschweig, *Das Abkommen zur Bekämpfung von Genocide*, 3 DIE FRIEDENSWARTE FÜR ZWISCHENSTAATLICHE ORGANISATION 97, 99 (1949).

114. J. POMIANKOWSKI, *DER ZUSAMMENBRUCH DES OTTAMANISCHEN REICHES* 162 (1969).

sacres of 1895-96, when the Great Powers did not even reprimand the Sultan.<sup>115</sup>

Morgenthau's opinion was unequivocally confirmed by the Young Turk party leader Talat, one of his chief sources in Turkish government circles. Talat told Dr. Mordtman, the man in charge of the Armenian desk and the dragoman at the German Embassy at Istanbul, that Turkey was "intent on taking advantage of the war in order to thoroughly liquidate its internal foes, i.e., the indigenous Christians, without being thereby disturbed by foreign intervention."<sup>116</sup> In a joint memorandum to Berlin requesting the removal of German Ambassador Metternich, on account of the envoy's unceasing efforts to intercede on behalf of the Armenians, Talat (along with war lord Enver) reemphasized this point: "the work must be done *now*; after the war it will be too late."<sup>117</sup>

The observations of two prominent German experts also merit special attention. In explaining Turkey's motivation for entering World War I on the side of Germany, K. Ziemke, a renowned German political scientist, described Turkey's desire to extricate herself from the bondage of the Armenian Reform Agreement of February 8, 1914, an agreement initiated in the wake of the 1912 Balkan war, as a contributing factor. He in fact recognized the massacre and destruction of "one million Armenians" during that war as "the radical solution" of the Armenian question delivering Turkey from the burden of all future vexations; by so doing,

115. H. MORGENTHAU, *supra* note 23, at 9. Louis Heck, the U.S. High Commissioner in Istanbul and a Special Assistant of the Department of State, also pointed out the opportunity factor provided by World War I: "[T]he Young Turk Government soon availed itself of the opportunity afforded by war conditions to try to exterminate the Armenian population of Asia Minor and thus rid itself once and for all of the 'Armenian question.'" FO 371/3658/75852, Folio 441, at 2 (May 19, 1919).

116. The Talat statement is in German Ambassador Wangenheim's June 17, 1915 report to his Chancellor in Berlin. A.A. TÜRKEI 183/37, A19744; J. LEPSIUS, DEUTSCHLAND UND ARMENIEN 1914-1918 84 (1919).

These judgments are confirmed by Ernst Jäckh, the German expert on Turkey who undertook several inspection trips to Turkey during the war, relaying his conversations with high ranking Turkish officials and his observations to Kaiser Wilhelm II at his Headquarters, the German Chamber of Deputies, and the Foreign Office. In his 22-page report covering his September-October 1915 trip he stated, "Indeed Talat openly hailed the destruction of the Armenian people as a political relief." A.A. TÜRKEI 158/14, at 18 (Oct. 17, 1915). Another German author, the last German Ambassador to Turkey in World War I, commented in his memoirs: "When I kept on pestering him on the Armenian Question, he once said with a smile, 'What on earth do you want? The question is settled. There are no more Armenians.'" The ambassador later explained this assertion of having solved the Armenian Question in terms of the ancestral territories of the victims, namely, "Armenia where the Turks have been systematically trying to exterminate the Christian population." Despite his expressions of esteem for Talat, the ambassador conceded Talat's role in that extermination: "His complicity in the Armenian crime he atoned for by his death." MEMOIRS OF COUNT BERNSTORFF 176, 180, 374 (Eric Sutton trans. 1936).

117. U. TRUMPENER, GERMANY AND THE OTTOMAN EMPIRE 127 (1967) (emphasis in original).

the Turkish Government eliminated the conditions for future reform projects and the allied pressures.<sup>118</sup> More significantly, a German officer serving as Vice Consul of Erzurum (where a large Armenian population was destroyed) informed Berlin that "the Armenian question which for decades occupied the attention of Europe's diplomats is to be solved in the course of the present war . . . [M]easures undertaken by the Turkish government . . . are tantamount to the total destruction of the Armenians."<sup>119</sup>

This view is further corroborated by sources within the Ittihadist regime itself. Cemal Paşa, who served both as a member of the Young Turk triumvirate running the Ittihadist regime between 1908-18 and also as the Commander of the Fourth Army and Marine Minister during the war, states in his memoirs that, "our sole objective (*bizim yegâne gayemiz*) was to free ourselves from all the governmental measures [imposed upon us] in this war and which constituted a blow to our internal independence."<sup>120</sup> These shackles involved the international stipulations on the autonomy of Lebanon, and the Armenian reform agreement signed on February 8, 1914 between Turkey and Russia, with the concurrence of the other Powers. As Cemal stated, "We wanted to tear up that Agreement."<sup>121</sup> Enver, also a member of the ruling Ittihad triumvirate, likewise denounced the reforms stipulated by the international agreement of February 8, 1914. During an exchange on August 6, 1915 with Hans Humann (German naval attaché and Enver's childhood friend), the Min-

118. K. ZIEMKE, *DIE NEUE TÜRKEI 1914-1929*, 271-72 (1930).

119. A.A. TÜRKEI 183/39, A28584 (Aug. 10, 1915 report by Dr. Max Erwin von Scheubner Richter). See also J. LEPSIUS, *supra* note 116, at 123-24.

120. C. PAŞA, *HATIRALAR* 438 (1977).

Cemal in the September-December 1913 period, during which the Armenians were again pressing for reforms to be executed under European control, repeatedly threatened the Armenian leaders with massacres through "the Muslim populations of the six provinces" targeted for reforms. The threat was made to Vartkes, one of the Armenian Deputies serving in the Ottoman Parliament. Being an ardent Ittihadist, Vartkes, who was also a nationalist Dashnak leader, was advised to inform his party of this threat, warning it against further solicitation of European intervention. A. KARO, *ABRUADZ ORER (Lived Days) 191-92* (1948). This threat was confirmed by K. Zohrab, another Armenian Deputy and a professor of international law at Istanbul's law school. In his pre-World War I secret diary, Zohrab, in anticipation of the genocide, called attention to Cemal's threat. *Zohrabee Orakroutinu Yegernee Nakhoriageen* (K. Zohrab's Diary on the Eve of the Genocide), VII NAVASART (Armenian Los Angeles monthly), Apr. 1989, at 21. Both Vartkes and Zohrab were arrested and summarily killed during the war by agents of the Special Organization.

In December 1913, Cemal had several Armenian students arrested for leading the festivities celebrating the 1500th anniversary of the invention of the Armenian alphabet. When exhorting them to stop their "traitorous activities," Cemal again threatened to "exterminate the Armenians, sparing neither infants nor the old." L. MOZIAN., *AKSORAGANEE MU VOTISAGANU: SEV OREROU HISHADAGNER (An Exile's Odyssey: Memories of Dark Days)* 9-10 (1958).

121. C. PAŞA, *supra* note 120, at 438.

ister admitted that the main rationale of the anti-Armenian measures was "the total elimination of any basis" for future interventions by the Powers on behalf of the Armenians.<sup>122</sup> As a departmental head in the Turkish Justice Ministry declared, "There is no room for Armenians and Turks in our state, and it would be irresponsible and thoughtless for us if we didn't take advantage of this opportunity [afforded by the war] to do away with [the Armenians] thoroughly."<sup>123</sup>

## 2. *The Annulment of the Treaties*

Through a December 16, 1914 Imperial Rescript, the Agreement of February 8, 1914 was cancelled.<sup>124</sup> Talat, then Interior Minister, justi-

122. A.A. KONSTANTINOPEL 170, folio 52; J. LEPSIUS, *supra* note 116, at 122.

123. J. LEPSIUS, DER TODESGANG DES ARMENISCHEN VOLKES 230 (1930).

124. Jäschke, *Das Osmanische Reich vom Berliner Kongress bis zu seinem Ende (1878-1920/22)*, 6 HANDBUCH DER EUROPÄISCHEN GESCHICHTE 543, 545-56, n. 36 (1968). *See also* 3:3 Y.BAYUR, TÜRK İNKILÂBİ TARİHİ (The History of the Turkish Revolution) 12 (1957); British Ambassador Mallet's Sept. 23, 1914 report to Grey in FO 371/2116/56207.

The cancellation coincided with the termination of the contract of the two inspectors, a Dutchman, L.C. Westenenk, Assistant Resident in the Dutch East Indies, and a Norwegian, Nicolai Hoff, Major, later Lieutenant Colonel, in the Norwegian Army and the Secretary General of the Norwegian Ministry of War, who were to implement the reforms. However, as Toynbee pointed out, the two Inspectors' mission was intentionally handicapped by the Turkish authorities so as to derail and abolish it at an opportune moment:

A clause was inserted in the Inspectors' contract of engagement, empowering the Government to denounce it at any moment upon payment of an indemnity of one year's salary—a flat violation of the ten years' term provided for under the scheme; and the list of "superior officials" was inflated until the patronage of the Inspectors, which, next to their irrevocability, would have been their most effective power, was reduced to an illusion. The unfortunate nominees were spared the farce of exercising their maimed authority. They had barely reached their provinces when the European War broke out, and the Government promptly denounced the contracts and suspended the Scheme of Reforms, as the first step towards its own intervention in the conflict. Thus, at the close of 1914, the Armenians found themselves in the same position as in 1883. The measures designed for their security had fallen through, and left nothing behind but the resentment of the Government that still held them at its mercy. The deportations of 1915 followed as inexorably from the Balkan War and the Project [Agreement] of 1914 as the massacres of 1895-6 had followed from the Russian War and the Project of 1878 [Berlin Treaty].

J. (VISCOUNT) BRYCE, *infra* note 132, at 635-36; *see also* AUSTRIAN POLITICAL OFFICE FOREIGN AFFAIRS ARCHIVES, 12 *Türkei*, Karton 463. In Austrian Ambassador Pallavicini's May 16, 1914 report, he informed Vienna that "many of the competences agreed upon by the Powers were not included in the contract," and in his May 25, 1914 report he complained that the two Inspectors were being treated as subordinate civil servants under the authority of the Turkish government, not as European Inspectors General. Westenenk in his diary quoted Talat as describing Hoff and him as "just our officials," with Hoff repeatedly expressing doubt about the seriousness of the Turkish rulers. *See* Van der Dussen, *The Westenenk File*, 39 ARMENIAN REV. 46, 57, 69, 72 (1986). Interior Minister and Party Chief Talat's two appointments were revealing in this respect, portending ominous developments for the Armenians. Diyarbekir Deputy Feyzi and Bitlis province Governor Mustafa Abdulhalik, his brother-in-law, were assigned to the staff of Hoff as Deputies. Both men were subsequently to play pivotal roles in the destruction of the largest concentration of Armenians in southeastern and eastern Turkey, involving the provinces of Diyarbekir and Bitlis. Abdulhalik was later assigned to the post of Governor of Aleppo province, directing the ancillary liquidation of the

fied this move by declaring to Dr. Mordtman, "*C'est le seul moment propice*."<sup>125</sup> This reflected a general determination during the war to abrogate the international treaties that had resulted from the application of the principle of "humanitarian intervention." On September 5, 1916, Ottoman Foreign Minister Halil informed German Ambassador Wolff-Metternich that "the Ottoman Cabinet had decided to declare null and void the Paris Treaty of 1856, the London Declaration of 1871, and the Berlin Treaty of 1878."<sup>126</sup> As Halil explained, "all three of these international treaties had imposed 'political shackles' on the Ottoman state which the Porte intended to be rid of."<sup>127</sup> It is important to note that Kühlmann, the German Ambassador at Istanbul, pointed to the relationship between the Armenian reform movement and the imposition of these "shackles" on Turkey, especially the February 8, 1914 Reform Agreement, as providing the rationale for the ensuing genocide. Two weeks before he became Foreign Minister, Kühlmann, in a February 16, 1917 report reviewing the history of the Turko-Armenian conflict, traced "the destruction of the Armenians, which has been carried out on a large

remnants of the Armenian population who had survived the ordeal of an exacting forced trek from the interior to the deserts of Mesopotamia in 1915-16. A.A. TÜRKİ 183/38, A24658, Enclosure VI of Aug. 20, 1915 report; Jhamanag (Istanbul) 6/19 July 1914, describes the other, i.e., Abdulhalik's assignment, whose complicity in the Armenian genocide is sketched in Dadrian, *The Naim-Andonian Documents on the World War One Destruction of the Ottoman Armenians—The Anatomy of a Genocide*, 18 INT'L J. MIDDLE EASTERN STUD. 342, 336-38 (1986).

125. A.A. TÜRKİ 183/36, A5043 (Ambassador Wangenheim's Feb. 2, 1915 report to Berlin).

126. U. TRUMPENER, GERMANY AND THE OTTOMAN EMPIRE 1914-1918 134-35 (1968).

127. *Id.* Halil on the same day departed to Berlin to seek German support for the annulments. In informing his government of this move in his Sept. 5, 1916 report, German Ambassador Metternich directed attention to the Turkish concern for article 61 of the Berlin Treaty involving Turkey's "engagements for Armenia," and to Halil's justification of the act on grounds of "the effect of war" (*Kriegszustand*). A.A. TÜRKİ, 183/44, A24061. The full text of the repudiation of the treaties in German is in Kraelitz-Greifenhorst, *Die Ungültigkeitserklärung des Pariser und Berliner Vertrages durch die osmanische Regierung*, 43 ÖSTERREICHISCHE MONATSSCHRIFT FÜR DEN ORIENT 56-60 (1917), where Halil predicates his abrogation of the Paris and Berlin Treaties on the following main arguments: (1) The Paris Treaty provisions proscribing interference in the internal affairs of Turkey were violated through some of the provisions of the Berlin Treaty. (2) While the Ottoman Empire scrupulously adhered to the two treaties, Italy, England, France and Russia repeatedly violated them. (3) France coerced Turkey to grant limited autonomy to Lebanon illegally; moreover, the provisions of the autonomy were not part of any international treaty or agreement but rather internal administrative adjustments. Hence, they could be revoked and cancelled. (4) Russia blatantly violated the Paris Treaty by acts of agitation in the Balkan provinces, an aggressive war against Turkey, a series of interventions in the internal affairs of Turkey, and by illegally subverting the status of the Black Sea port city of Batum. (5) The present conditions have altered the situation in that Turkey was no longer under the Powers' tutelage and as a totally independent state could act with all the rights and privileges conferred upon such a state. (6) This new situation justified the conclusion that the two treaties forfeited their right to exist. For the English text of Halil's statements, see 5 CURRENT HISTORY (N. Y. Times monthly publication) 822-24 (Feb. 1917).

scale, resulting from a policy of extermination," to "Armenian reform endeavors, especially those launched during the 1912 Balkan war."<sup>128</sup>

### 3. *The Allies' Warning and the Introduction of the Principle of "Crimes Against Humanity"*

As the genocide was beginning, the Allies issued a joint declaration on May 24, 1915 condemning "the connivance and often assistance of Ottoman authorities" in the massacres. "In view of these new crimes of Turkey against humanity and civilization," the declaration continued, "the Allied governments announce publicly . . . that they will hold personally responsible . . . all members of the Ottoman government and those of their agents who are implicated in such massacres."<sup>129</sup>

### B. *The Implementation of the Genocide*

Alleging treasonable acts, separatism, and other assorted acts by the Armenians as a national minority, the Ottoman authorities ordered, for national security reasons, the wholesale deportation of the Armenian population of the Empire's eastern and southeastern provinces.<sup>130</sup> This measure was subsequently extended to virtually all of the Empire's Armenian population, including such far away cities as Bursa, Eskişehir, Konya, and the Ottoman capital, Istanbul.<sup>131</sup>

128. A.A. TÜRKİ 183/46, A5919. In his memoirs Talat confirms this Turkish reaction to renewed Armenian reform efforts. TALÂT PAŞANIN HATIRALARI (The Memoirs of Talat Paşa) 50-55 (E. Bolayır ed. 1946).

129. GUERRE 1914-1918, TURQUIE. 887. I. *Arménie* (May 26, 1915); FO 371/2488/51010 (May 28, 1915); A.A. TÜRKİ 183/37, A17667; *Foreign Relations of the United States*, 1915 Supp., 981 (1928); U.S. National Archives, Record Group 59, 867. 4016/67 (May 28). See also the report of Polish jurist Litawski, the Legal Officer of the U.N. War Crimes Commission, who in addition to writing Chapter II in the volume cited in note 113 (WAR CRIMES COMMISSION) prepared a separate report, U.N. Doc. E/CN. 4/W. 20/ Corr. 1, at 1, no. 3 (1948). (The May 28, 1915, date is a misprint for May 24, 1915, in these works, including that of Schwelb, *supra* note 113, at 181).

130. 3:3 Y. BAYUR, *supra* note 124, at 37-38.

131. German Embassy Chargé von Neurath informed Berlin on November 12, 1915: "According to a reliable source, the Turkish Government has, contrary to all assurances, decided to deport the Armenians of Constantinople also." A.A. TÜRKİ, 183/40, A33705. On December 7, 1915, German Ambassador Metternich informed Berlin that 4,000 Armenians had recently been removed from Constantinople, that the total number of those deported from the Ottoman capital up to that time had reached 30,000, and that "gradually a clean sweep will be made of the remaining 80,000 Armenian inhabitants" of the Ottoman capital. A.A. TÜRKİ, 183/40, A36184. For additional corroboration of this pattern of deportation of Istanbul's Armenians, see Zurlinden, *infra* note 182, at 705; H. STÜRMER, *infra* note 138, at 55 (and the German original, *infra* note 155, at 48-51) (author maintains that Istanbul police used daily quota system to deport Armenians in groups ranging from 200-1,000). See also A. TOYNBEE, *ARMENIAN ATROCITIES: THE MURDER OF A NATION* 77-78 (1915); Ambassador Morgenthau's October 4, 1915 cipher No. 1121. R.G. 59, 867.4016/159; A. REFIK, *infra* note 133, at 23-24 (Turkish intelligence officer recounts own observations about "atrocious" deaths of the victims of these cities "so far removed from the war zones.").

The execution of this order, ostensibly a wartime emergency measure of relocation, actually masked the execution of the Armenian population. The vast majority of the deportees perished through a variety of direct and indirect atrocities perpetrated during the deportations. As Winston Churchill wrote,

In 1915 the Turkish government began and ruthlessly carried out the infamous general massacre and deportation of Armenians in Asia Minor . . . the clearance of the race from Asia Minor was about as complete as such an act, on a scale so great, could well be. . . . There is no reasonable doubt that this crime was planned and executed for political reasons. The opportunity presented itself for clearing Turkish soil of a Christian race opposed to all Turkish ambitions, cherishing national ambitions that could be satisfied only at the expense of Turkey, and planted geographically between Turkish and Caucasian Moslems.<sup>132</sup>

132. W. CHURCHILL, *THE WORLD CRISIS: THE AFTERMATH* 405 (1929).

Three massive volumes in English, German, and French document these atrocities, relying mostly upon neutral observers (Swiss, American, Swedish), and German and Austrian civilian and military officials stationed in Turkey as war-time allies. (1) J. (VISCOUNT) BRYCE, *THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE 1915-16*, His Majesty's Stationery Office, Miscellaneous No. 31, (A. Toynbee comp. 1916) (Viscount Bryce, also author of the classic *The American Commonwealth* (1888), was Regius Professor of Civil Law at Oxford from 1870-1893, entered Parliament in 1880, and during 1907-1913 was Ambassador to the United States, signing the Anglo-American Arbitration Treaty in 1911. After the war he was appointed Chairman of a Royal Commission on German atrocities in Belgium and subsequently became a member of the Hague Permanent Court of Arbitration); (2) J. LEPSIUS, *supra* note 116; (3) A. BEYLERIAN, *LES GRANDES PUISSANCES, L'EMPIRE OTTOMAN, ET LES ARMÉNIENS DANS LES ARCHIVES FRANCAISES 1914-18* (1983). Because the second volume was compiled during the war, some critics questioned the impartiality and balance of its contents. To prove the veracity of the work, Bryce submitted the material before publication to a number of scholars for evaluation. Among them was Gilbert Murray, Regius Professor at Oxford, who declared: "I realize that in times of persecution passions run high. . . But the evidence of these letters and reports will bear any scrutiny and overpower any skepticism. Their genuineness is established beyond question. . ." *Id.* at xxxi. H.A.L. Fisher, Vice-Chancellor of Sheffield University, declared: "The evidence here collected. . . will carry conviction wherever and whenever it is studied by honest enquirers. . . It is corroborated by reports received from Americans, Danes, Swiss, Germans, Italians and other foreigners. . . It is clear that a catastrophe, conceived upon a scale quite unparalleled in modern history, has been contrived for the Armenian inhabitants of the Ottoman Empire." *Id.* at xxix. Moorfield Storey, the former President of the American Bar Association, observed:

I have no doubt that, while there may be inaccuracies of detail, these statements establish without any question the essential facts. It must be borne in mind that in such a case the evidence of eye-witnesses is not easily obtained; the victims, with few exceptions, are dead; the perpetrators will not confess. . . Such statements as you print are the best evidence which, in the circumstances, it is possible to obtain. They come from persons holding positions which give weight to their words, and from other persons with no motive to falsify, and it is impossible that such a body of concurring evidence should have been manufactured. . . In my opinion the evidence which you print. . . establishes beyond any reasonable doubt, the deliberate purpose of the Turkish authorities practically to exterminate the Armenians, and their responsibility for the hideous atrocities which have been perpetrated upon that unhappy people.

*Id.* at xxxi, xxxii. In commenting on Toynbee's competence and scrupulousness in compiling the material Bryce declared "[n]othing has been admitted the substantial truth of which seems

A secret propaganda campaign operated by Department II of the Turkish War Office followed the deportation order. The campaign sought to deflect blame from the Turkish government by labeling the Armenians a national security threat. As one Turkish naval captain attached to the office recounted:

In order to justify this enormous crime (*bu muazzam cinayet*) [of the Armenian genocide] the requisite propaganda material was thoroughly prepared in Istanbul. [It included such statements as:] "the Armenians are in league with the enemy. They will launch an uprising in Istanbul, kill off the Itihadist leaders and will succeed in opening up the straits [to enable the Allied fleets to capture Istanbul]." These vile and malicious incitements [were such, however, that they] could persuade only people who were not even able to feel the pangs of their own hunger.<sup>133</sup>

The main vehicle of this anti-Armenian agitation was the Ottoman propaganda weekly *Harb Mecmuası* (War Magazine). Edited by Colonel Seyfi, the head of Department II at the War Office, this weekly's influence went well beyond its 15,000 subscribers. A Turkish newspaper during the Armistice declared that it was Seyfi who, as director of the Political Department at Ottoman General Headquarters, mapped the strategy of the massacres against the Armenians, mobilizing the *çetes* (brigands) of the Special Organization, in close cooperation with Dr. B. Şakir, and under the auspices of the Ittihad party's Central Committee.<sup>134</sup> The Turkish government also worked to deflect blame for the eventual killing of the Armenians through its use of the Special Organi-

open to reasonable doubt. Facts only have been dealt with; questions of future policy have been carefully avoided." *Id.* at xvi. In his note to Vice-Chancellor Fisher, Toynbee himself described the volume as "an awful piece of history. Fortunately, one gets absorbed in the work of editing and arranging the documents and half deadened to things themselves." FO 96/206/IV, Aug. 4, 1916. In the circular attached to the volume and sent to 250 American publications, Toynbee noted, "The fiendish character of the atrocities committed and the deliberate, systematic plan on which they were organized from Constantinople appear to me to be the most striking features that emerge." *Id.*

133. A. REFIK (Altınay), *İKİ KOMİTE İKİ KİTAL* (Two Committees and Two Massacres) 40 (1919). Dismissing these pieces of agitation as crass propaganda that "defies every logic," Refik returns to his central theme, that under the guise of deportation and wartime relocation, Ittihad pursued the goal of "destroying (*imha*) the Armenians." *Id.* at 23. Refik later became a Professor of History at the University of Istanbul.

134. The newspaper is the daily *Sabah*, from which an Armenian daily probably a day or two later, repeated that declaration in summary form. ARIAMARD (namesake of *Djagadamard*) Dec. 13, 1918. This shows the enormous power of Colonel Seyfi, a graduate of the Istanbul Turkish War Staff Academy and a longtime Ittihadist supporter of war lord Enver; he later became General Düzgören in the Turkish Republic. According to U.S. Acting Secretary of State William Phillips, Seyfi "was vested with great power." FO 371/4173, folio 345 (March 20, 1919) (report to U.S. Ambassador to England John Davis assessing Seyfi's liability as a top war criminal). British intelligence during the Armistice obtained a document from the Turkish Interior Ministry's National Security Office files in which Seyfi is described as one of the five top Ittihadist leaders plotting the genocide against the Armenians. FO 371/4172/31307, folio 386.



zation. The members of the Special Organization, mostly ex-convicts, would be identified as the actual villains and portrayed as "beyond the authority and control of the government." An American author noted this method and described the unruly "group of brigands" who made up the Special Organization as "a secret, rather disreputable group."<sup>135</sup>

### 1. *Mobilization and Deportation*

Invoking the principle of "armed neutrality," Turkey, with the assistance of German staff officers, launched a general mobilization on August 3, 1914. Among those affected by this scheme were male Armenians, who were inducted in three stages. First called were those between twenty and forty-five years of age, followed by those between fifteen and twenty, and finally those in the forty-five to sixty age group, who were used as pack animals for the transport of military equipment.<sup>136</sup> About a month later, on September 6, 1914, the Interior Ministry instructed the provincial authorities, through a cipher circular, to keep Armenian political and community leaders under surveillance. When Turkey finally entered the war by a preemptive attack on Russian seaports and shipping in the Black Sea some two months later,<sup>137</sup> the military's emergency measures assumed inordinate dimensions of severity. The requisitions in particular stripped the provincial Armenian population of most of their accumulated goods; the confiscations included almost anything subsumed under the general category of supplies and provisions for the Army.<sup>138</sup> Widespread governmental provocations, during which some Armenians clashed with gendarmes and soldiers who were harassing

135. P. STODDARD, *THE OTTOMAN GOVERNMENT AND THE ARABS, 1911 TO 1918: A PRELIMINARY STUDY OF THE TEŞKILÂT-İ MAHSUSA (SPECIAL ORGANIZATION)* 49-50 (1963).

136. American Ambassador Morgenthau describes the use of these Armenian conscripts as pack animals and their eventual destruction as follows:

Army supplies of all kinds were loaded on their backs, and, stumbling under the burdens and driven by the whips and bayonets of the Turks. . . almost waist high through snow. . . If any stragglers succeeded in reaching their destinations, they were not infrequently massacred. In many instances, Armenian soldiers were disposed of in even summary fashion, for it now became almost the general practice to shoot them in cold blood.

H. MORGENTHAU, *supra* note 23, at 302.

137. U. TRUMPENER, *supra* note 126, at 51.

138. In discussing these requisitions, Dr. Henry Stürmer, the Istanbul correspondent of the influential German daily newspaper *Kölnische Zeitung*, noted,

When I speak of requisitioning, I do not mean the necessary military carrying off of grain, cattle, vehicles, buffaloes, and horses, general equipment, and so on . . . I do not mean that, even though the way it was accomplished bled the country far more than was necessary, falling as it did in the country into the hands of ignorant, brutal, and fanatical underlings, and in the town being carried out with every kind of refinement by the central authorities. Too often it was a means to violent "nationalisation" and deprivation of property and rights exercised especially against the Armenians, Greeks, and subjects of other Entente countries.

H. STÜRMER, *TWO YEARS IN CONSTANTINOPLE* 115 (G. Allen trans. 1917).

them, accentuated these hardships.<sup>139</sup> There were also sporadic acts of sabotage by isolated groups of Armenians.<sup>140</sup> This unrest culminated in the Interior Ministry order of April 24, 1915 authorizing the arrest of all Armenian political and community leaders suspected of anti-Ittihad or nationalistic sentiments. Thousands of Armenians were seized and incarcerated; in Istanbul alone 2,345 such leaders were arrested<sup>141</sup> and eventually executed. A large number of them were neither nationalists nor in any way involved in politics. None of them were tried and found guilty of war-time sabotage, espionage, or any other crime.

The last and decisive stage of the process of reducing the Armenian population to helplessness was deportation. In a Memorandum dated May 26, 1915, the Interior Minister requested from the Grand Vezir the enactment through the Cabinet of a special law authorizing deportations. The Memorandum was endorsed on May 29 by the Grand Vezir even though the Cabinet did not act on it until May 30. The press, meanwhile, had already announced the promulgation of the new emergency law, called the Temporary Law of Deportation,<sup>142</sup> on May 27. Without referring to the Armenians, the law authorized the Commanders of Armies, Army Corps, Divisions, and Commandants of local garrisons to order the deportation of population clusters on suspicion of espionage, treason, and on military necessity. The key word was "sensing" (*hissetmek*); the authorities, empowered to order deportations, had merely to have a feel or a sense of the offense or danger.<sup>143</sup> This vague but

139. See J. (VISCOUNT) BRYCE, *supra* note 132, at 33-36 (American nurse Grace Knapp's eyewitness account); see also C. USSHER, AN AMERICAN PHYSICIAN IN TURKEY 264-65 (1917); R. DE NOGALES, FOUR YEARS BENEATH THE CRESCENT 60-70, 80-89, 95 (M. Lee trans. 1926) (detailed description of Venezuelan officer who led Turkish artillery in reducing Armenian defenses in Van).

140. As Morgenthau related, "some Armenians proposed to defend their own lives and their women's honor against the outrages. . . Nothing was sacred to the Turkish gendarmes; under the plea of searching for hidden arms, they ransacked churches, treated the altars and sacred utensils with the utmost indignity. . . They would beat the priests into insensibility." H. MORGENTHAU, *supra* note 23, at 304-05. Commenting on his intimate exchanges with "authoritative Turkish personalities," Erzurum's German Vice Consul, Captain von Scheubner-Richter, in a Dec. 4, 1916 summary report to his Chancellor in Berlin reveals Turkish plans to provoke Armenians into "acts of self-defense" which then were used as a basis for "inflated descriptions" of Armenian insurgency and, therefore, as "pretexts" for subsequent murder. A.A. TÜRKİ 183/45, A33457. On April 26, 1915, the German Consulate at Adana relayed to the German Embassy the German text of a lengthy report in which the Armenian Supreme Patriarch of the See of Cilicia bitterly complains to the Armenian Patriarch in Istanbul of "the outrageous atrocities and mistreatments the sole purpose of which is to provoke the peaceful people of the region to extreme acts in order to provide the government an excuse for annihilation." A.A. KONSTANTINOPEL 168 (No. 2540); see also J. LEPSIUS, *supra* note 116, at 53-54.

141. E. URAS, TARIHTE ERMENİLER VE ERMENİ MESELESİ (The Armenians and the Armenian Question in History) 612 (2d ed. 1976).

142. For the English text of the law, see R. HOVANNISIAN, ARMENIA ON THE ROAD TO INDEPENDENCE 1918 51 (1967).

143. TAKVİMİ VEKAYİ, No. 2189 (May 19/June 1, 1915).

sweeping authorization resulted in the deportation of the bulk of Turkey's Armenian population. As one Turkish historian admitted, the Interior Minister "was intent on creating an accomplished fact," and "railroad[ed] the Cabinet approval of the law" by beginning to administer the deportations prior to submitting his draft bill.<sup>144</sup> The Temporary Law of Deportation, it should be noted, was eventually repealed "on account of its unconstitutionality" in a stormy November 4, 1918 session of the post-war Ottoman Parliament, during which the Armenian massacres, the scope of the victims, and the responsibility of the government were debated.<sup>145</sup>

### 2. *Expropriation and Confiscation of Goods and Assets*

A supplementary law enacted on June 10, 1915 contained instructions on how to register the properties of the deportees, how to safeguard them, and how to dispose of others through public auctions, with the revenues to be held in trust for remittance to the owners upon their return after the war.<sup>146</sup> Another Temporary Law promulgated on September 26, 1915, disposed of the deportees' goods and properties. It provided for the handling of the debts, credits, and assets of the deportees. In relaying this new law to the German Foreign Office, Gwinner, the Director of Deutsche Bank, sarcastically stated that the eleven articles might well have been compressed into the following two: "1. All goods of the Armenians are confiscated. 2. The government will cash in the credits of the deportees and will repay (or will not repay) their debts."<sup>147</sup>

Unlike the Temporary Law of Deportation which, though approved by the Cabinet, was never promulgated by the Ottoman Parliament as required by article 36 of the Ottoman Constitution, the Ottoman Senate publicly debated the Temporary Law of Expropriation and Confiscation (the Temporary Law). Over a two month period, from October 4 through December 13, 1915, a lone Senator, Ahmed Riza, raised his voice in opposition to the proposed measure.<sup>148</sup> The course of the debate

144. Y. BAYUR, *supra* note 124, at 38. In I T. TUNAYA, *TÜRKIYEDE SİYASİ PARTİLER* (The Political Parties in Turkey) 579 (2nd enlarged ed. 1984), the author characterizes this "accomplished fact" as typical of Ittihad bypassing the regular channels of the government. According to the testimony of Finance Minister Cavid the General Mobilization on August 2/3, 1914 was likewise ordered prior to the approval of the Cabinet. Vakit (Istanbul), HARB KABİNELERİNİN İSTİCVABI (The War Cabinets' Hearings) 81 (1933) [hereinafter WAR CABINETS' HEARINGS].

145. JHAMANAG (Istanbul daily), November 5, 1918.

146. FO 371/4241/170751.

147. A.A. TÜRKİ 183/39, A29127 Oct. 7, 1915 report. The French text of the 11 articles is listed in A.A. TÜRKİ 183/39, A29127, and J. LEPSIUS, *supra* note 116, at 214-16.

148. J. LEPSIUS, *supra* note 116, at 216-18. Senator Ahmed Riza was one of the original founders of Ittihad. Subsequently, however, he became a dissident fighting vigorously against

sheds further light on the political forces and biases that shaped the Ottoman government's decisions.

In the September 21/October 4, 1915 session of the Senate, Senator Riza pleaded with his government to allow the deportees, "hundreds and thousands of whom, women, children and old people, are helplessly and miserably wandering around in the streets and mountains of Anatolia[,] to return to their original places of residence or to settle wherever they wish before the onset of the winter."<sup>149</sup> He then submitted a draft bill that proposed to postpone the Temporary Law's application until after the end of the war.<sup>150</sup>

Senator Riza claimed that the Temporary Law was contrary to Article 16 of the Ottoman Constitution because it was announced two days before the convening of the Parliament. He further argued that "[i]t is also inimical to the principles of law and justice. This law must, therefore, pass first through the Parliament and go into effect only after the end of the war. Hence, on the basis of Article 53 of the Constitution[,] I request the change as proposed in the bill before us."<sup>151</sup> The ensuing debate revealed that the Parliament knew nothing about the Temporary Law in question, and that nobody knew when, if ever, it would come to the Parliament for consideration. Therefore, no proposal for change would be entertained. Following Senator Riza's expression of concern that the Temporary Law might either come too late or not at all to the Parliament, the Senate voted to transmit the Senator's bill to the Legislative Acts Committee of the Senate.

In the October 19/November 1, 1915 session of the Senate, Senator Riza again urged his fellow legislators to consider the suffering of the wretched deportees of the Anatolian mountains before the winter season. He requested that the Senate expedite relief which, according to the President of the Senate, the government had formally promised to provide.<sup>152</sup> In discussing these debates, prominent Turkish historian Bayur noted the pressures brought to bear upon Senator Riza to withdraw his bill; one Deputy shouted at Riza "this is not the time to provoke rumors"<sup>153</sup>—alluding to the delicate political matter of the massacres that were still in progress. Bayur states that Senator Riza was especially harrassed during

Ittihad excesses. On Oct. 19, 1918, in his first post-war speech in the Senate, Riza invoked the memory of "the Armenians who were murdered in a beastly manner." A.A. TÜRKİ 201/9, A46488.

149. J. LEPSIUS, *supra* note 116, at 216.

150. For this purpose, the bill amended article 2 of the Temporary Law to read as follows: "This law goes into operation after the end of the World War and one month after the signing of the peace treaty." *Id.*

151. *Id.* at 217.

152. A.A. TÜRKİ 183/39, A33514, Oct. 19/Nov. 1, 1915 report.

153. Y. BAYUR, *supra* note 124, at 46.

the November 24/December 7, 1915 session, when the Senate decided to consider the bill only after the bill was reported to it. As Bayur observed, "[t]wo and a half months had elapsed since the bill was introduced and the Chamber of Deputies hadn't even begun to consider it. Clearly, the Parliament was intent on sanctioning the application of the Temporary Law while putting Riza's bill 'to sleep.'" <sup>154</sup>

During the November 30/December 13, 1915 session, Senator Riza once more raised his voice, this time protesting the subversion of the Constitution, which forbade the implementation of any law before the Parliament passes it in session. Since the law had been introduced in the Chamber of Deputies after the Chamber had convened, Riza argued, the matter became the concern of the Legislative branch. Focusing on the key elements of the Temporary Law, the Senator raised the following objection:

It is unlawful to designate the Armenian assets and properties as 'abandoned goods' [*emvali metruke*] for the Armenians, the proprietors, did not abandon their properties voluntarily; they were forcibly, compulsively [*zorla, cebren*] removed from their domiciles and exiled. Now the government through its officials is selling their goods . . . . Nobody can sell my property if I am unwilling to sell it. Article 21 of the Constitution forbids it. If we are a constitutional regime functioning in accordance with constitutional law we can't do this. This is atrocious. Grab my arm, eject me from my village, then sell my goods and properties, such a thing can never be permissible. Neither the conscience of the Ottomans nor the law can allow it. <sup>155</sup>

In his November 4, 1915 communication to the State Department, Morgenthau confirmed the occurrence of these debates. He further disclosed that Talat himself exerted the greatest pressure upon Senator Riza by threatening to initiate more severe measures against the Armenians should Riza continue his agitation on their behalf: "From other sources it is stated that the Cabinet promised to modify their attitude towards the Armenians if Ahmed Riza and his friends would agree not to interpellate the government. This Ahmed Riza and his friends did." <sup>156</sup> The Tempo-

154. *Id.* at 46-49.

155. *Id.* at 48. Dr. Harry Stürmer, the Istanbul correspondent of the German daily newspaper *Kölnische Zeitung*, relates an incident at the same Parliament when war lord Enver, Talat's acolyte, "went so far as to hurl the epithet 'shameless dog' [*edebsiz köpek*] at Ahmed Riza in the Senate without being called to order by the President." H. STÜRMER, *supra* note 138, at 256; see also ZWEI KRIEGSJAHRE IN KONSTANTINOPEL. SKIZZEN DEUTSCH-JUNG-TÜRKISCHER MORAL UND POLITIK 232 (1917).

156. R.G. (L) 59, 867.00/797 1/2, U.S. FOREIGN REL. L. at 763. Further confirmation of the purported accommodation between Senator Riza and the Ittihad government can be found in A.A. TÜRKİ 183/39, A33514.

The importance of economic motives in the genocide is highlighted by the following incident. Ambassador Morgenthau wrote in the diary he kept during the war:

rary Law was thus left intact. A Turkish Armistice government facing the victorious Allies<sup>157</sup> subsequently annulled the law on January 8, 1920, but the insurgent Kemalists reversed the annulment on September 14, 1922.<sup>158</sup>

During the November-December 1918 hearings of the Fifth Committee of the Ottoman Chamber, investigating, among other things, the war-time massacres, several Turkish Deputies took former Justice Minister Ibrahim to task over the illegal aspects of the expropriation. One of them pointed out the widespread "robberies and plunders" that were committed in the course of the confiscations."<sup>159</sup> Ibrahim conceded that "abuses" occurred which his government investigated.<sup>160</sup> Other observers were less charitable in their analysis. The Swiss historian Zurlinden, in a detailed study of the Armenian genocide, quoted "a knowledgeable German" source who stated: "What really happened was an expropriation carried out on the greatest scale against 1.5 million citizens."<sup>161</sup> American Consul Jackson pointed to the major role the confiscation played in the genocidal scheme of the Turkish government, identifying the genocide as "a gigantic plundering scheme as well as a final blow to extinguish the [Armenian] race."<sup>162</sup> Turkish historian Dogan Avcioğlu confirms this point stating that after the European inter-

One day Talaat made what was perhaps the most astonishing request I had ever heard. The New York Life Insurance Company and the Equitable Life of New York had for years done considerable business among the Armenians. The extent to which this people insured their lives was merely another indication of their thrifty habits.

"I wish," Talaat now said, "that you would get the American life insurance companies to send us a complete list of their Armenian policy holders. They are practically all dead now and have left no heirs to collect the money. It of course all escheats to the State. The Government is the beneficiary now. Will you do so?"

This was almost too much, and I lost my temper. "You will get no such list from me," I said and I got up and left him.

H. MORGENTHAU, *supra* note 23, at 339.

157. G. JÄESCHKE, I TÜRK İNKILÂBİ TARİHİ KRONOLOJİSİ 1918-1923 (The Chronology of the Turkish Revolution) 61 (N.R. Aksu trans. 1939) (citing TAKVİMİ VEKAYİ No. 3747).

158. *Id.* at 136 (citing I KAVANIN MECMUASI 482 (1922) (the Code of Public Laws of the newly established Ankara government)). There are several works treating the issue of confiscations during the war. After extensive legal debate, four prominent experts in international law decided that the Armenian survivors were entitled to reclaim their properties and assets, and to massive indemnities. These arguments are compiled in a book by COMITÉ CENTRAL DES REFUGIÉS ARMÉNIENS, CONFISCATION DES BIENS DES REFUGIÉS ARMÉNIENS PAR LE GOUVERNEMENT TURC (1929). Some more recent works are K. BAGHDJIAN, LA CONFISCATION PAR LE GOUVERNEMENT TURC DES BIENS ARMÉNIENS . . . DITS ABANDONNÉS (1987); S. TORIGUIAN, *supra* note 113, at 85-96; L. VARTAN, HAIGAGAN DASNUHINKU YEV HAYERU LUKIAL KOUYKERU (The Armenian 1915 and the Abandoned Goods of the Armenians) (1970).

159. WAR CABINETS' HEARINGS, *supra* note 144, at 522.

160. *Id.* at 527.

161. 2 S. ZURLINDEN, DER WELTKRIEG 596 (1918).

162. R.G. 59.807.4014/148 (enclosure in Ambassador Morgenthau's August 30, 1915 report).

ventions of 1856-78, “[t]here emerged a need to radically solve this problem. The nationalization of the economy was the complementary part of this policy . . . Among those who quickly enriched themselves in the process of the expropriation of the Armenians were [İttihad] party influentials, ex-officers serving as party operatives, and Turkish immigrants.”<sup>163</sup>

Neither the Temporary Law on Deportations nor the Temporary Law of Expropriation and Confiscation referred specifically to the Armenians or, in fact, to any nationality. During the secret Parliamentary debates of the fledgling Turkish Republic after World War I, however, Turkish Deputies were told that the general terms were used to conceal the true purposes of the law from the Armenians. This fact emerged during the debate on April 3, 1924, when Deputy Musa Kâzım objected to article 2 of a draft fiscal bill which used the cover formula, “a political body of people” (*siyasi zümre*) to target non-Muslim minorities. He argued that: “[t]he guilt of a person should be determined in a court of law. In my opinion, the insertion in a bill of economic character of a clause smacking of politics is very much out of place. It is a shame. I implore you to let us remove it.”<sup>164</sup> In responding to this objection, former Finance Minister Hasan Fehmi, representing the Parliamentary Commission in charge of preparing the bill in question, explained the rationale of secretly targeting non-Muslims, given the risks of specifically identifying them in the bill. He said that the Commission had secretly made a deal with the Finance Minister to the effect that the Muslims were to be excluded from the application of the law. In this connection, he revealed the fact that the same procedure had been adopted during the war when the September 13/26, 1915 Temporary Law on Expropriation and Confiscation was instituted:

Not a single Muslim’s goods were liquidated . . . you can establish these facts by examining the old records of the secret deliberations. The Parliament at that time secretly secured reassurances from the Finance Minister that the law would not apply to Muslims who had fled as a result of war.

163. 3 D. AVCIOĞLU, *MILLÎ KURTULUŞ TARİHİ* (History of the National Liberation) 1137, 1141 (1974). Sina Akşin likewise maintains that the Armenian deportations were implemented in pursuit of economic goals which eliminated minority dominance and competition in business and industry, allowing Muslims to control these areas. See SINA AKŞIN, 100 SORUDA JÖN TÜRKLER VE İTTİHAT VE TERAKKİ (İttihad ve Terakki in the Context of 100 Questions) 283 (1980).

164. 4 TÜRKİYE BÜYÜK MİLLET MECLİSİ GİZLİ CELSE ZABITLARI 429 (1985) (Transcripts of the Secret Sessions of the Grand National Assembly of Turkey, March 2, 1923-October 25, 1934) (28th secret session, second sitting).

Only after registering this assurance did we proclaim to the world that law. Presently, we are repeating that procedure.<sup>165</sup>

Deputy Kâzım withdrew his motion and the bill was approved.<sup>166</sup>

### 3. *The Genocidal Killings*

Contrary to the avowals of Ottoman authorities who promulgated these emergency laws, the Armenians did not return from the deportation.<sup>167</sup> The deportations proved to be a cover for the ensuing destruction. As American Ambassador Morgenthau observed:

The real purpose of the deportation was robbery and destruction; it really represented a new method of massacre. When the Turkish authorities gave the orders for these deportations, they were merely giving the death warrant to a whole race; they understood this well, and, in their conversations with me, they made no particular attempt to conceal the fact.<sup>168</sup>

By official Turkish accounts alone, those directly killed numbered about 800,000,<sup>169</sup> not counting the tens of thousands of wartime conscripts liquidated by the military. To quote Morgenthau again:

In many instances Armenian soldiers were disposed of in even more summary fashion, for it now became almost the general practice to shoot them in cold blood. In almost all cases the procedure was the same. Here and there squads of 50 or 100 men would be taken, bound together in groups of four, and then marched out to a secluded spot a short distance from the village. Suddenly the sound of rifle shots would fill the air, and the Turkish soldiers who had acted as the escort would sullenly return to camp. Those sent to bury the bodies would find them almost invariably stark naked, for, as usual, the Turks had stolen all their clothes. In cases that came to my attention, the murderers had added a refinement to the victims' sufferings by compelling them to dig their graves before being shot.<sup>170</sup>

In a message to his Ambassador in Istanbul (October 2, 1916), German Undersecretary of Foreign Affairs Zimmermann, who six weeks later re-

165. *Id.*

166. *Id.* The Finance Minister at the time was Mustafa Abdulhalik, who was present at the sitting and promised to execute the law as formulated. His pivotal role in the Armenian Genocide as governor of two large provinces, Bitlis and Aleppo, and as deputy to Talat in the Interior Ministry is discussed in *supra* note 124, and in Dadrian, *infra* note 169, at 331-32, 336-38. It is noteworthy that during the debate several Deputies singled out the Jews with the derogatory Turkish epithet "Mişon," denouncing them as the real "blood-suckers" of Turkey and insisting that the law should apply to them with special emphasis. *Id.* at 430-31.

167. S. SHAW & E. SHAW, 2 HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY 315 (1977). The authors completely ignore the deceptiveness of these avowals.

168. H. MORGENTHAU, *supra* note 23, at 309.

169. This figure was released by a post-war Turkish Interior Minister relying on statistics compiled by his Ministry. See Dadrian, *supra* note 124, at 342. In a recent volume by a Turkish historian this figure is confirmed as a more or less accurate computation by Turkish authorities. 3:4 Y. BAYUR, *supra* note 124, at 787 (1983).

170. H. MORGENTHAU, *supra* note 23, at 302-03.



placed Jagow as Foreign Minister, denounced the exterminations accompanying the deportations, including the forcible "mass conversions" to Islam of Armenian children whose parents had been killed, as cause for "indignation in the entire civilized world."<sup>171</sup> He added that he had discussed his feelings on this point with Turkish Foreign Minister Halil. In that communication Zimmermann used the expression "with an appearance of legality" when describing the official deportation measures.<sup>172</sup>

### C. *The Disguises of the Law of Deportation and Ancillary Acts*

#### 1. *Ultimate Responsibility for the Deportation*

Ultimate responsibility for these measures must lie with members of the Ittihad party. Ittihad was able to accomplish the anti-Armenian measures through its powerful stranglehold on the Turkish government. Indeed, to fully understand the de facto power structure of the Ottoman government in wartime emergency conditions, one must recognize that the executive branch's actions were substantially freed from the restraints of the already emasculated legislature.<sup>173</sup> At the same time, the military and the quasi-military gained a preponderance of authority, legitimized by the very same executive. Superseding these institutions was the autocracy of Ittihad, a monolithic political party that dominated the state apparatus.

As noted above, the Temporary Law of Deportation<sup>174</sup> was railroaded through the Cabinet Council in May, 1915, when the deportations were already well underway. By resorting to this unauthorized tactic "Interior Minister Talat singlehandedly assumed a very grave responsibility . . . he probably wanted to forestall some opposition in the Cabinet."<sup>175</sup> The fourth article of that law, rarely publicized in pertinent literature, contains two stipulations. The first charged the War Minister with executing the deportations (*meriyeti ahkâm*). This stipulation was consonant with the Monarch's prerogatives spelled out in article 7 of the Constitution. Nevertheless, the Interior Ministry and its subsidiary offices, including the provincial centers of administration, security, police, and gendarmery forces, actually organized and administered the deporta-

171. Two prominent Turkish authors likewise denounced the practice of forcing Islam on Armenian orphans. See H. EDİB, *THE TURKISH ORDEAL* 16 (1928); D. AVCIOĞLU, *supra* note 163, at 1141.

172. A.A. KONSTANTINOPEL 174/27, and A.A. TÜRKİ 183/44 A26071, corroborated by the Turkish author A.E. Yalman in his memoirs, *infra* note 180, at 332.

173. Turkish historian Bayur mentions that attitude of War Minister Enver as typical in this respect. Enver's contempt for the procedures of orderly enactment of laws was expressed in his motto: "If there is no [corresponding] law then make up law and [thus] you have law" (*yok kanun, yap kanun, var kanun*). 3:2 Y. BAYUR, *supra* note 124, at 400 (1955).

174. For the text of the law, see *supra* note 142.

175. Y. BAYUR, *supra* note 124, at 38.

tions.<sup>176</sup> The second stipulation refers to the formal promulgation of the law by the Parliament "in its next session," as provided by Article 36 of the Ottoman Constitution. There is no evidence that this formal promulgation occurred when the temporarily suspended Parliament reconvened on September 28, 1915.

Interior Minister Talat reveals in his memoirs that the suspension of Parliament was directly connected to the intended anti-Armenian measures.<sup>177</sup> The architects of the "deportation" felt that as long as the Parliament was in session, they could take no effective counter-measures against the Armenians in response to the anti-Turkish acts that were being attributed to them. Moreover, suspending Parliament allowed the Deputies to return to their electoral districts and inform their constituencies about the Armenian danger. The Supreme Directorate of Ittihad made the decision to suspend Parliament on March 1, 1915 to facilitate the deportations.<sup>178</sup> This marks one more instance in which Ittihad, a political party, substituted its will for government policy, in this case preempting the legislative branch.

## 2. *The Special Organization (Teşkilatı Mahsusa)*

During this time, Ittihadist leaders secretly formed a unit called the Special Organization, one of whose principal purposes was resolving the Armenian question. Equipped with special codes, funds, cadres, weapons, and ammunition, they functioned as a semi-autonomous "state within the state."<sup>179</sup> Their mission was to deploy in remote areas of Turkey's interior and to ambush and destroy convoys of Armenian deportees.<sup>180</sup> The cadres consisted almost entirely of convicted criminals, released from the Empire's prisons by a special dispensation issued by the

176. *Id.* at 40; see also C. PAŞA, *supra* note 120, at 440.

177. 2 C. KUTAY, TALAT PAŞANIN GURBET HATIRALARI (The Memoirs of Talat Paşa in Exile) 907 (1983). Specifically, the proposal was made by Ittihad General-Secretary Mithat Şükrü (Bleda).

178. This termination one and a half months earlier than stipulated by the law (Feb. 11, 1915 Amendment of art. 35 of the Constitution), necessitated the reconvening of the Parliament on Sept. 28, 1915, one and a half months sooner than the normal date. Jäschke, *Die Entwicklung des osmanischen Verfassungstaates von den Anfängen bis zur Gegenwart*, 5 DIE WELT DES ISLAMIS 37 (1917).

179. C. KUTAY, BİRİNCİ DÜNYA HARBINDE TEŞKİLATI MAHSUSA (The Special Organization During World War I) 38 (1962). Most of the data contained in this book was supplied by one of the special organization's founders and chiefs, E. Kuşçubaşı.

180. In his July 27, 1915 report to his Chancellor in Berlin, Germany's Aleppo Consul Rössler described the Special Organization massacre details as "convicts, released from the prisons, and put in military uniform. They were deployed on locations through which the doomed deportee convoys were scheduled to pass." A.A. TÜRKİ 183/38, A23991; see also J. LEPSIUS, *supra* note 116, at 111; 1 A. YALMAN, YAKIN TARİHTE GÖRDÜKLERİM VE İŞİTTİKLERİM (The Things I Saw and Heard in Recent History) 331 (1970).

Ministries of both Interior and Justice.<sup>181</sup> In his testimony before the Fifth Committee of the Ottoman Chamber of Deputies on November 10, 1918, ex-Justice Minister Ibrahim acknowledged such a release of convicts from the prisons.<sup>182</sup> The application for Imperial Legal Authorization (*Irade*) to form the Special Organization was deliberately framed in a “vague formula to deflect attention from its secret goals”; this formula invoked “national ideals and objectives to be ensured through solidarity and cohesiveness to secure which will be the purpose of the Organization.”<sup>183</sup>

The stated responsibilities of the Special Organization included intelligence, counter espionage, and preventing sabotage. The writings of two Turkish authors who had access to secrets of the Special Organization, however, indicate that its actual duty was the execution of the Armenian genocide. Kutay alluded to the Ittihad Central Committee’s covert objectives in setting up the Special Organization as involving “the vital interests of Turkey which could not be openly acknowledged as being part of Ittihad’s program”;<sup>184</sup> the other, a principal Special Organization chief who “had assumed duties” in connection with the Armenian deportations, admitted to having accomplished things which the government and law enforcement agencies “absolutely couldn’t,” namely, “the execution of measures against non-Turkish nationality population clusters.”<sup>185</sup> Turkish historian Avcioğlu was even more direct. He wrote:

In order to radically solve the Armenian question, Ittihad through the Special Organization resorted to systematic and large scale deportations. Hundreds of thousands of Armenians were in a very short time and *en masse* taken to spots outside Anatolia. This policy, supported by the Germans,

181. F. ATAY, *ZEYTİNDAĞI* 35-36 (1981).

182. WAR CABINETS’ HEARINGS, *supra* note 179, at 537. Western sources estimate the number of these convicts between 30,000, E. DOUMERGUE, *L’ ARMÉNIE, LES MASSACRES ET LA QUESTION D’ORIENT* 24-25 (1916), and 34,000, 2 S. ZURLINDEN, *supra* note 161, at 657.

183. C. KUTAY, *supra* note 179, at 39. In touching on this point of deflection, political scientist Melson argues with reference to the massacres of the Hamidian era, that thereby “massacre could achieve the desired results without clearly implicating the central government.” Melson, *supra* note 82, at 507. As noted above in *supra* note 135, another American author specializing in the missions of the Special Organization suggests that the authorities used the organization to shift the onus for their perpetrations to “groups of brigands” which could not be controlled from Istanbul. P. STODDARD, *supra* note 135, at 49, 50.

184. 3 C. KUTAY, *supra* note 177, at 1299. The writings of two officers within the Special Organization also confirm the direct involvement of the Ittihad Central Committee. In his memoirs, the lieutenant colonel of the Special Organization conceded that Central Committee authorized the anti-Armenian measures which led to the massacres, describing these measures as reprisals against Armenian “insurgents.” H. ERTÜRK, *infra* note 364, at 217, 327. The lieutenant colonel’s right hand man likewise maintained that the Ittihad’s Central Committee, a sort of directorate under Talat, formulated special plans for the Special Organization’s missions. G. VARDAR, *İTTİHAD VE TERAKKİ İÇİNDE DÖNENLER* (The Inside Story of Ittihad ve Terakki) 244-46, 274 (S. Tansu ed. 1960).

185. C. KUTAY, *supra* note 179, at 38, 78.

was sponsored in the Councils of Ittihad by Dr. Bedaeddin Şakir . . . The liquidation of the Christian elements was decided upon outside the auspices of the official government and at the headquarters of the Ittihad, following deliberations that lasted months. Young officers whom the Ittihad trusted were recalled to Istanbul and were briefed [on the missions with which they were] entrusted.<sup>186</sup>

These covert missions of the Special Organization were first exposed through the efforts of the Turkish press. On November 4, 1918, ten days after the signing of the Armistice, the Turkish daily *Hadisat*, in an open letter to Grand Vezir Izzet, first mentioned publicly the existence and wartime criminal activities of this organization.<sup>187</sup> In December, the press reported the statements, made during a debate in the Chamber by the Turkish Deputy from Trabzon, mentioning the Special Organization as the principal tool of the massacres and admitting that "up until now we had remained silent about all this."<sup>188</sup> In an open letter to the Justice Minister, the opposition daily *Sabah* provided the most explicit public exposure of the Special Organization's existence and the complicity of the Justice Minister in its activities:

Did you not drop by every morning at Talat's home to receive your atrocious orders from that brigand chief [*çete başı*]? Did you not, as a result of a decision reached at Ittihad's party headquarters, release from the central prison of Istanbul the most ferocious murderers so that they could kill with axes the innocent Armenians in the vicinity of towns and villages of which they were the inhabitants? Did you not order similar releases from prisons in the provinces? Was it not the general purpose to select the most blood-thirsty murderers and enroll them in the brigand cadres [of the Special Organization] for which end you appointed the procuror-general of the Appellate Court, whereas [the] War Minister was represented by a high ranking officer? Furthermore, was not a physician appointed also to determine whether the selected convicts would be fit to apply a degree of sav-

186. 3 D. AVCIOĞLU, *supra* note 163, at 1114, 1135. Reference should be made to the following findings made by British political and military intelligence. When reporting to London about the Court Martial death sentence against Şakir, British High Commissioner Admiral John de Robeck wrote, "He was a member of the small secret Committee known as Teshkilati Mahsusa [the Special Organization] formed by the Central Committee of the Committee of Union and Progress [the Ittihad] to organize the extermination of the Armenian race." FO 371/5089/E949, Feb. 18, 1920 report. An intelligence report prepared by the Istanbul branch of the M.I.L.C. likewise stated: "Teshkilati Mahsusa [was] created by the CUP in 1914 for the extermination of the Armenians and was controlled by the infamous Behaeddin Shakir." FO 371/5171/E12228, at 7 (August 29, 1920).

187. HADISAT (Istanbul), November 4, 1918.

188. JHAMANAG (Istanbul), December 12, 1918; ARIAMARD (Istanbul), December 12, 1918. The deputy was Hafız Mehmet, who later became the Interior Minister in the fledgling Turkish Republic and was executed in July, 1926 on charges of conspiring against the life of Mustafa Kemal, the founder of the Republic. E. ZÜRCHER, *THE UNIONIST FACTOR* 154 (1984).

agery of killing desired by you? Did not the formation of the brigand criminals take place in the office of the same procuror-general of the Appellate Court which was located just below your own office? Did not this organizational work continue for weeks during which one could observe the prison convicts being brought to the corridors located outside of the offices of the procuror-general, the chamber of the Criminal Court, and the Court-room itself?<sup>189</sup>

In his November 9, 1918, testimony before the Ottoman Parliament's Fifth Committee investigating "the misdeeds" of the Cabinet Ministers, Grand Vezir Sait Halim twice stated that the Cabinet had not authorized the formation of the Special Organization. The Organization, which he called "a very bad thing," was thus constituted outside the purview of the government.<sup>190</sup> The Justice Minister made the same statement.<sup>191</sup> Both officials admitted that the purpose of the deportations was subverted, as the Grand Vezir clearly testified, to "killing." In this connection, in one paragraph he used the term "massacre" three times, dropping entirely the term "deportation."<sup>192</sup>

A captain of the Ottoman War Office's Intelligence Department, subsequently a professor of history at Istanbul University and a prolific author, wrote of the massacres:

The criminal gangs who were released from the prisons, after a week's training at the War College's training grounds, were sent off to the Caucasian front as the brigands of the Special Organization, perpetrating the worst crimes against the Armenians. . . The Ittihadists intended to destroy the Armenians, and thereby to do away with the Question of the Eastern Provinces.<sup>193</sup>

### 3. *Efforts to Disguise Responsibility and Intent: A Challenge for Punishment*

On May 24, 1915, the Allies declared the Turkish government and its officials responsible for the massacres then in progress. Despite the continuance of the government-sponsored Armenian genocide, the Ottomans responded to the declaration by carefully disguising the intent behind the anti-Armenian massacres. The Turkish response stated that the Ottoman government "considers its principal duty to resort to any measure it deems appropriate for safeguarding the security (*muhafazai emniyet*) of its borders, and feels, therefore, that it has no obligation

189. SABAH (Istanbul), Nov. 21, 1918.

190. WAR CABINETS' HEARINGS, *supra* note 144, at 308, 309.

191. *Id.* at 534, 535.

192. *Id.* at 290, 293-94.

193. A. REFIK, *supra* note 133, at 23.

whatsoever to give an account to any foreign government.”<sup>194</sup> This statement implicitly relied upon the rule of international law that “the state is entitled to treat its own citizens at discretion.”<sup>195</sup> At the same time, the Turkish declaration served as an artful deflection, hedging against the criminal consequences of intent. Ultimately, the question of intent became the cardinal challenge to the ensuing prosecution. As one legal scholar pointed out, “governments less stupid than that of National Socialist Germany will never admit the intent to destroy a group as such, but will tell the world that they are acting against the traitors. . . .”<sup>196</sup>

Laws enacted under such conditions and rationale run the risk of being sham laws transforming the principle of legality into willful license. The intent of the crime of genocide can be located precisely in that particular zone which separates the stated purposes of the law from the consequences of its application. When massive deportations culminate in mass destruction, the law covering the former betrays a criminal intent to achieve the latter. The religious strain in the Ottoman-Turkish martial legacy only reinforced that intent. The proclamation of holy war (*cihad*) on November 11, 1914,<sup>197</sup> carefully planned beforehand, proved an expedient catalyst in that respect, despite the fact that it was formally aimed at the Entente powers, *i.e.*, France, England and Russia, while excluding Turkey’s equally Christian allies Germany and Austria.

### III. The Aftermath: Efforts Toward Punishment

As World War I ended, the Allies focused attention on punishment for the war crimes committed against the Armenians. At first, the Allies attempted to apply principles of international law to the perpetrators of the massacres. The initial impulse to seek justice, however, faded in the months after the war and eventually gave way to political expediency. The Turkish government’s attempts to bring its own nationals to justice also faltered. The rise of nationalism, and the Turkish populace’s increasingly defiant attitude toward the Allies, weakened the government’s resolve in its quest for justice. This weakened resolve and the Allies’ own waning interest sabotaged the efforts to punish those responsible for the genocide.

194. E. URAS, *supra* note 141, at 621 (1950); in the 1976 edition the editors instead use the expression “public safety” (*genel güvenlik*), at 612.

195. 1 L. OPPENHEIM & H. LAUTERPACHT, *INTERNATIONAL LAW* 583 (7th ed. 1948).

196. Finch, *The Genocide Convention*, 43 AM. J. INT’L. L. 743 (1949).

197. For a discussion of the holy war proclamation itself, see P. STODDARD, *supra* note 183, at 24-31 & 26 n.43.

### A. *Allied Attempts at Retributive Justice*

When Turkey signed the Armistice on October 30, 1918, she lay at the mercy of the European Allies.<sup>198</sup> Churchill described Turkey as being “under the spell of defeat, and of deserved defeat.”<sup>199</sup> Similarly, British Foreign Minister Curzon denounced Turkey as “a culprit awaiting sentence.”<sup>200</sup> Turkey’s “culpability,” in Allied eyes, involved mainly war crimes and crimes against her own citizens. The Allies, pursuant to their warning in May, 1915, initiated criminal proceedings against Turkish officials suspected of complicity in the Armenian massacres.

#### 1. *The Judicial Arm of the Paris Peace Conference*

In January, 1919, the Preliminary Peace Congress in Paris established the Commission on Responsibilities and Sanctions. Chaired by U.S. Secretary of State Lansing, its First Subcommission (also known as the Commission of Fifteen) examined, among other offenses, “barbarous and illegitimate methods of warfare.” This included the category of “offenses against the laws and customs of war, and the principles of humanity,” which the French representative of the Third Subcommission, Larnaude, insisted was “absolutely” necessary to ensure human rights.<sup>201</sup>

The Commission of Fifteen proceeded in its investigation according to the terms of the Fourth Hague Convention. This Convention, part of the 1907 Second Peace Conference, was intended to give “a fresh development to the humanitarian principles [towards] evolving a lofty conception of the common welfare of humanity.”<sup>202</sup> In the Preamble of the Convention, the Contracting Parties attempted to guarantee that “the inhabitants and belligerents remain under the protection and governance of the principles of the law of the nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the

198. Having not declared war against Turkey until April 1917, the United States did not at that time maintain a belligerent status toward Turkey.

199. W. CHURCHILL, *supra* note 132, at 367.

200. 4 DOCUMENTS ON BRITISH FOREIGN POLICY 1919-1939 661 (First Series, W. Woodward & R. Butler eds. 1952) (Statement of Minister Curzon, July 4, 1919).

201. FO 608/246, Procès-Verbal no. 6, at 57 (folio 417)(Mar. 8, 1919). For a description of the gradual emergence in the Allied countries’ political and legal circles of an agreement to punish the Central Powers’ civilian and military officials suspected of war- or atrocity-crimes, see J. READ, ATROCITY PROPAGANDA 1914-19 240-84 (1941); for details of the Commission deliberations see *id.* at 254-65. The work of the Commission was divided into three areas with three corresponding subcommittees: (1) Criminal Offenses respecting (a) violation of peace through aggression and (b) war crimes; (2) Responsibilities of the War involving the offenders covered under (1)(a) above and their criminal liabilities and their possible prosecution; (3) Violations of the laws of war affecting the offenders covered under (1)(b) above and their criminal liabilities and possible prosecution. Lansing headed this last Sub-committee, otherwise called the Commission of Fifteen.

202. WAR CRIMES COMMISSION, *supra* note 113, at 24.

dictates of public conscience.”<sup>203</sup> It was in this context that Nicolas Politis, a member of the Commission of Fifteen and Foreign Minister of Greece, proposed the adoption of a new category of war crimes meant to cover the massacres against the Armenians, declaring: “Technically these acts did not come within the provisions of the penal code, but they constituted grave offenses against] the law of humanity.”<sup>204</sup> Despite the objections of American representatives Lansing and Scott, who challenged the ex-post facto nature of such a law, the majority of the Commission “hesitatingly” concurred with Politis.<sup>205</sup> The Commission based its decision upon a Hague Convention principle which allowed for reliance upon “the laws of humanity” and “dictates of public conscience”<sup>206</sup> whenever clearly defined standards and regulations to deal with grave offenses were lacking.

A March 5, 1919 report by the Commission specified the following violations against civilian populations: systematic terror; murders and massacres; dishonoring of women; confiscation of private property; pillage; seizing of goods belonging to communities, educational establishments and charities; arbitrary destruction of public and private goods; deportation and forced labor; execution of civilians under false allegations of war crimes; and violations against civilians as well as military personnel.<sup>207</sup> The Commission’s final report, dated March 29, 1919, spoke of “the clear dictates of humanity” which were abused “by the Central Empires together with their allies, Turkey and Bulgaria, by barbarous or illegitimate methods” including “the violation of . . . the laws of humanity.”<sup>208</sup> The report concluded that “all persons belonging to enemy countries . . . who have been guilty of offenses against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.”<sup>209</sup> Prompted by the Belgian jurist Rolin Jaequemeyns, the

203. *Id.* at 25. See also FINAL ACT OF THE SECOND PEACE CONFERENCE, THE HAGUE (1907) (Cmd. 4175) (1914), reprinted in 36 Stat. 2277, Treaty Series No. 539, with Annex.

204. J. WILLIS, *supra* note 12, at 157.

205. *Id.*

206. When a Committee of Jurists in 1920 was commissioned by the Council of the League of Nations to prepare the Statute of Permanent Court of International Justice, the issues of humanity and civilization surfaced again. Baron Descamps of Belgium, the Chairman, injected into the concept of international law not only such rules as were “recognized by the civilized nations but also by the demands of public conscience [and] the dictates of the legal conscience of civilized nations.” After much debate, including the objections of Elihu Root, the American representative, the Committee adopted his revised version, the third point of which referred to “the general principles of law recognized by civilized nations.” P.C.I.J., ADVISORY COMMITTEE OF JURISTS, Procès-Verbaux of the Committee, June 16-July 24, 1920, at 310, 318, 331, 344.

207. See Articles 1, 23, 46, 53, and 56 of the Fourth Hague Convention, FO 608/246, Procès-Verbal, Annexe. 2e Rapport, at 60.

208. VIOLATIONS, *supra* note 12, at 19.

209. *Id.* The dissenting American members were Robert Lansing and James Scott, who felt that the words “and the laws of humanity” were “improperly added.” *Id.* at 64, 73. In



Commission included, albeit did not sharply highlight, the crimes which Turkey was accused of having perpetrated against her Armenian citizens.<sup>210</sup>

As a result of the Commission's efforts, several articles stipulating the trial and punishment of those responsible for the genocide were inserted into the Peace Treaty of Sèvres, signed on August 10, 1920.<sup>211</sup> Under article 226, "the Turkish government recognize[d]" this right of trial and punishment by the Allied Powers, "notwithstanding any proceedings or prosecution before a tribunal in Turkey."<sup>212</sup> Moreover, Turkey was obligated to surrender "all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by rank, office or employment which they held under Turkish authorities."<sup>213</sup> Under article 230 of the Peace Treaty, Turkey was further obligated

to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914. The Allied powers reserve to themselves the right to designate the tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognize such tribunal. The provisions of Article 228 apply to the cases dealt with in this Article.<sup>214</sup>

The Treaty of Sèvres, therefore, provided for international adjudication of the crimes perpetrated by the Ottoman Empire against the Armenians during World War I. Unfortunately, these provisions never came into force. As discussed in the following section, political tensions within the Allied Powers and nationalistic passions in Turkey eventually led to the scrapping of this Treaty.

### 2. *The Legal Gropings of the British*

While the international community was attempting to pursue the punishment of the Turkish war criminals under international law, the British were likewise attempting to bring these accused mass murderers to jus-

their Memorandum of Reservations, they maintained that the law and principles of humanity were not "a standard certain" to be found in legal treatises of authority and in international law practices. They argued that these laws and principles do vary within different periods of a legal system, between different legal systems, and with different circumstances. In other words, they declared that there is no fixed and universal standard of humanity, and that a judicial organ only relies on existing law when administering it.

210. See FO 608/246, Third Session, Feb. 20, 1919, at 20 (folio 163).

211. 1920 Gr. Brit. T.S. No. 11.

212. *Id.* See also J. WILLIS, *supra* note 12, at 180.

213. J. WILLIS, *supra* note 12, at 180-81.

214. *Id.* at 181.

tice. Their efforts, however, proved no more successful than those embodied in the Treaty of Sèvres.

a. *The High Commission and the Law Officers of the Crown*

The immediate task facing the Allies following the Armistice was the treatment of the enemies' accused war criminals. The crimes charged fell into two major categories. The first concerned "the mistreatment" of war prisoners, mostly British; the second referred to "deportations and massacres," principally against the Armenians.<sup>215</sup> The sudden escape from Istanbul of the seven top Young Turk leaders aboard a German destroyer on the night of November 1-2, 1918, catalyzed action against the remaining high ranking officials and party leaders. As Richard Webb, Rear Admiral and Deputy High Commissioner at Istanbul, wired then British Foreign Secretary Arthur James Balfour: "There is hardly an organ of the Press which is not vehemently attacking these men . . . for their share in the massacres."<sup>216</sup> Describing the flight of these seven Turks in his memoirs, the Secretary-General of Ittihad, who stayed behind, indicated that the complicity of the fugitives in Armenian "deportations" was the chief reason for their flight.<sup>217</sup>

On January 18, 1919, British High Commissioner Admiral Calthorpe told the Turkish Foreign Minister, "His Majesty's Government are resolved to have proper punishment inflicted on those responsible for Armenian massacres."<sup>218</sup> Ten days later, Calthorpe wired London, "It was pointed out to [the Turkish] Government that when [the] massacres became known in England, British Statesmen had promised [the] civilized world that persons connected would be held personally responsible and that it was [the] firm intention of H.M. Government to fulfill [that] promise."<sup>219</sup> Deputy High Commissioner Webb, in an April 3, 1919 cipher telegram to the Peace Conference in Paris, declared:

To punish all persons guilty of Armenian atrocities would necessitate wholesale execution of Turks and I therefore suggest punishment should rather take the form of, nationally, dismemberment of [the] late Turkish

215. FO 371/4174/129560, at 2 (acting Assistant Secretary of State for Foreign Affairs Tilley's July 10, 1919 communication to the Law Officers of the Crown).

216. FO 371/3411/210534 (folio 334).

217. M. BLEDA, *IMPARATORLUĞUN ÇÖKÜŞÜ* (The Collapse of the Empire) 124 (1979).

218. FO 371/4174/118377 (folio 253).

219. *Id.* On March 20, 1919, the Director of British Military Intelligence relayed to the U.S. State Department a February 27, 1919 report from British Military Attaché Brigadier-General W.H. Deedes to General Allenby in which Deedes declared, "H.M. Government not only desired the punishment of massacrers, but intended to secure it . . . they would never forget what had been done during the war, much less condone it." FO 371/4173/44216 (folio 50).

Empire and, individually, in trial of high officials such as those on my lists whose fate will serve as an example.<sup>220</sup>

Punishment, however, required appropriate jurisdiction, legal evidence, penal codes, and the machinery to administer the applicable laws. The British were quite sensitive to the need to separate executive from judicial acts and to bar, as much as possible, political considerations from intruding into legal proceedings. Many British jurists insisted that the British Military Courts in occupied zones carry out the trial and punishment of Turkish offenders in accordance with the "Common Law of War." The "Common Law of War," it was argued, subsumed the violations of the customs and laws of war.<sup>221</sup> An authoritative opinion, issued by the Law Officers of the Crown in response to a detailed inquiry from the Foreign Office, clarified the legal ramifications of the alternatives. The Law Officers maintained, for example, that British Military Courts in occupied territories could proceed with such trials "if this course has the sanction of the British Government. The matter is not within the sphere of municipal law, but is governed by the customs of war and rules of international law[, hence] there is no *legal* objection."<sup>222</sup> In addition, such courts could try persons for any offenses committed outside the zones of occupation, provided that there is "the consent of the Turkish Government to the exercise of the jurisdiction."<sup>223</sup>

Speaking strictly of crimes such as the Armenian massacres, the Law Officers considered it preferable that such crimes "be reserved for disposal under the provisions of the Peace Treaty, and that there is no legal objection to the detention of these offenders. Such detention is an act of State, the propriety of which cannot be questioned by any court of law."<sup>224</sup> Because the British felt that the Turkish government was inca-

220. FO 371/4173/53351 (folios 192-93). There was similar agitation in the United States, where in the fall of 1918 Charles H. Livermore of the World Peace Foundation drew up a list of eleven "outlaws of civilization" meriting "condign punishment." The list included the three leading Young Turk leaders comprising the Ittihad triumvirate; *i.e.*, Talat, Enver, and Cemal. J. WILLIS, *supra* note 12, at 43. A similar, but larger list, was prepared in 1917 in France by Tancrede Martel, an international law expert, who argued that the men he indicted deserved to be tried as common criminals by ordinary civil and criminal courts of the Allied countries because of the type and scope of the atrocities they were accused of having perpetrated. In its final report, completed on Mar 29, 1919, the Commission on Responsibilities through Annex I, Table 2, identified 13 Turkish categories of outrages liable to criminal prosecution. J. READ, *supra* note 201, at 245, 266.

221. FO 608/244/8493 (folio 423), May 9, 1919 (Minutes by Lieutenant-Colonel J.H. Morgan).

222. FO 371/4174/129560, at 2-3 (folio 430-31) (all emphasis in the original). The Foreign Office inquiry was sent on July 10, 1919, by Acting Assistant Under-Secretary J.A.C. Tilley. The Aug 7, 1919, response of the Law Officers was signed by Gordon Hewart and Ernest M. Pollock.

223. *Id.* (folio 431).

224. *Id.*

pable of dealing with their own offenders, the Crown Law Officers concluded that it would be "practicable and desirable" to "insert . . . a provision quashing the [Turkish criminal proceedings]," and stipulating that "the offenders should be disposed of in the same manner as is decided upon for offenders in Allied custody."<sup>225</sup>

b. *Transfer of the prima facie suspects from Turkish to British custody*

Beginning in January, 1919, Turkish authorities, directed and often pressured by Allied authorities in Istanbul, arrested and detained scores of Turks. Those arrested comprised four groups: (1) the members of Ittihad's Central Committee; (2) the two war-time Cabinet Ministers; (3) a host of provincial governors; and (4) high ranking military officers identified as organizers of wholesale massacres in their zones of authority. The suspects were first taken to the Military Governor's headquarters and were subsequently transferred to the military prison maintained by the Turkish Defense Ministry. Their custody and the disposal of their case by the Turkish judiciary, however, posed serious problems.<sup>226</sup> Furthermore, events were complicated by political developments including: (1) Greek occupation of Smyrna (Izmir) in May, 1919; (2) the massive and demonstrative funeral, on April 12, 1919, of a district commissioner following his trial, conviction, and execution by the Turkish Military Tribunal for having been a principal perpetrator of Armenian massacres in his district; and (3) the series of mass demonstrations at various locations in Istanbul on May 20-23, 1919, challenging the Allied occupation forces and asserting Turkish national rights. As one Turkish author wrote, the danger of "storming the Bekiraga military prison in the style of the Bastille raid" to free the high ranking prisoners was imminent.<sup>227</sup> To mollify the public, on May 21 the Ottoman Grand Vezir ordered the release of forty-one prisoners.<sup>228</sup> Following that, the Interior Minister instructed the Director of Police not to proceed with any more arrests for the time

225. *Id.*

226. *See infra* note 228.

227. B. ŞİMŞİR, *MALTA SÜRGÜNLERİ* (The Malta Exiles) 113 (1976).

228. *Id.* Of these, twenty-six were ordered released by the Court Martial itself with the assertion, "There is no case against them." *SPECTATEUR D'ORIENT* (Istanbul), May 21, 1919. Admiral Calthorpe informed London regarding the forty-one Turks released from military prison by Ottoman authorities that "there was every reason to believe, [they] were guilty of the most heinous crimes. . . mainly in connection with massacres." FO 371/4174/88761 (folio 9) (May 30, 1919). Referring to the Malta exiles, Foreign Office Near East specialist Edmonds declared, "There is probably not one of these prisoners who does not deserve a long term of imprisonment if not capital punishment." FO 371/6509/E8745 (folios 23-24).

being.<sup>229</sup> These events prompted the British to initiate measures for the transfer of the detainees to British custody in Mudros and Malta.<sup>230</sup>

Turkish officials resisted handing over the offenders for trial before an international or inter-allied tribunal. They claimed that such a surrender of Turkish subjects contradicted the sovereign rights of the Ottoman Empire as recognized by England in the Armistice Agreement. As the Turkish Foreign Minister argued, compliance with the demand for surrender by the Turkish Government

would be in direct contradiction with its sovereign rights in view of the fact that by international law each State has [the] right to try its subjects for crimes or misdemeanors committed in its own territory by its own tribunals. Moreover, His Britannic Majesty having by conclusion of an armistice with the Ottoman Empire recognized [the] latter as a *de facto* and *de jure* sovereign State, it is incontestably evident that the Imperial Government possesses all the prerogatives for freely exercising [the] principles inherent in its sovereignty.<sup>231</sup>

Despite this argument, the Commission of Responsibilities and Sanctions of the Paris Peace Conference held that trials by national courts should not bar legal proceedings by an international or an allied national tribunal. On April 2, 1919, Foreign Minister Balfour stated that, should the Turks persist in their recalcitrant attitude, "pressure should at least be brought to bear upon them to refrain from instituting any form of proceedings against [the accused war criminals] until the Peace Conference has decided as to their ultimate disposal."<sup>232</sup>

On May 28, 1919, sixty-seven detainees were seized by surprise by the British and removed from the military prison. Twelve of them, mostly ex-Ministers, were taken to the island of Mudros, the rest to Malta. The twelve ministers were eventually transferred to Malta, where the number of prisoners rose to 118 by August, 1920.<sup>233</sup>

229. U.S. Admiralty Weekly Intelligence Report No. 15, R.G. 256, 867.002/10 (May 27, 1919). The British had decided in a February 25, 1919 conference that "it was undesirable to leave it to the Turkish authorities to try to punish such offenders as could not be competently tried by Military Courts." FO 608/244/3700 (folio 311-2). The participants of the conference included representatives of the Admiralty, War Office, and Foreign Office.

230. FO 371/4174 No. 1302/1 G. (folio 125) (May 22, 1919), and FO 371/4174/88761 (May 30, 1919). For British apprehension regarding further releases of Turkish detainees from the military prison ("some or all of them"), see FO 371/4173/76582 (folio 381) (May 19, 1919 report by Rear Admiral Webb).

231. FO 608/244/3749 (folio 315) (Rear Admiral Webb's February 19, 1919 telegram to London, quoting from the Turkish Minister's February 16 note whose original, full text in French is in FO 608/247/4222 (folio 177)).

232. FO 371/4173/47590 (folio 89).

233. Fourteen of the latter group were accused of mistreatment of British prisoners during the war.

c. *The effects of national and international politics*

In the months following the removal of Turkish suspects to Malta, the political climate in Istanbul, and particularly in the interior of Turkey, began to change to the Allies' detriment. As insurgent Kemalism<sup>234</sup> gained a foothold throughout Turkey, the Sultan's government steadily weakened. Moreover, the Allies began to bicker among themselves. Delays in the final peace settlement with Turkey complicated this volatile situation. France and Italy began to court the Kemalists in secret; the Italians lent the new regime substantial military assistance, and both the French and the Italians sabotaged British efforts to restore and strengthen the authority of the Sultan and his government.<sup>235</sup> In the face of these developments, Britain's resolve to secure justice in accordance with the May 24, 1915 Allied note was progressively attenuated.

Toward the end of September, 1919, the demise of pro-Sultan Damad Ferid's Cabinet became imminent. On November 17, 1919, the new High Commissioner Admiral de Robeck, told Curzon that

the present Turkish Government . . . [is] so dependent on the toleration of the organisers of the [Kemalist] National Movement that I feel it would be futile to ask for the arrest of any Turk accused of offences against Christians, even though he may be living openly in Constantinople . . . I do not consider it politically advisable to deport [to Malta] any more prisoners.<sup>236</sup>

Notwithstanding, the British Admiral stated almost prophetically that unless a legal process was initiated "it may be safely predicted that the question of retribution for the deportations and massacres will be an element of venomous trouble in the life of each of the countries concerned."<sup>237</sup>

234. The main tenets of Kemalism are summarized in two documents framed as the party was crystallizing the emergent post-war Turkish nationalism: the Declaration of the Kemalist Congress at Sivas (Sep. 9, 1919) and the subsequent National Pact (Jan. 28, 1920). See Mears, *Select Documents*, in MODERN TURKEY: A POLITICO-ECONOMIC INTERPRETATION, 1908-1923 INCLUSIVE 627-31 (E. Mears ed. 1924).

235. See D. LLOYD GEORGE, *supra* note 89 at 871, 878. Willis summed up the situation as follows:

During the two years between the armistice and Mudros and the signing of the treaty of Sèvres, the Turkish Nationalist movement grew into a major force, and the Allied coalition virtually dissolved. By 1920 most of the victors no longer included among their aims the punishment of Turkish war criminals. . . the Italians evaded a British request for the arrest of former Young Turk leaders then reported as meeting within their territory. The French and Italians hoped to secure concessions in Asia Minor and did not want to antagonize powerful factions in Turkey unnecessarily, particularly the rising Nationalists.

J. WILLIS, *supra* note 12, at 158.

236. FO 371/4174/156721 (folios 523-24).

237. FO 371/4174/136069 (folio 470).

### d. *The problem of probative and legal evidence*

Political considerations were not the only impediments to the commencement of retributive justice. In mid-1920, Lamb, the political-legal officer of the British High Commission at Istanbul, enumerated in a detailed Memorandum the evidentiary difficulties encumbering the effective prosecution of the authors of the Armenian genocide. These conditions were: (1) the impossibility of obtaining any Turkish documents regarding pertinent orders and instructions issued by the Central Government or provincial authorities; (2) the reluctance of the Allied Governments to participate in prosecuting the suspects accused of the massacre; (3) "the apparent apathy of our Authorities in the Middle East as evidenced by their replies to the H.C.'s queries in the matter"; (4) the massacre of the great majority of the adult male Armenian population in the provinces and of practically all the intellectuals; (5) the lack of public security and want of confidence about the intention of the Allies to exact punishment from the perpetrators, for those who could come forward and supply evidence; and (6) the indications of eventual release of prisoners from Malta.<sup>238</sup> Alarmed by the implications of these impediments, Lamb warned his superiors:

Unless there is whole-hearted co-operation and will to act among the Allies, the trials will fall to the ground and the direct and indirect massacres of about one million Christians will get off unscathed. Rather than this should happen, it were better that the Allies had never made their declarations in the matter and had never followed up their declarations by the arrests and deportations that have been made.<sup>239</sup>

In a report to London on March 16, 1921, High Commissioner Rumbold confirmed several of the points that Lamb made in this memo.<sup>240</sup>

Lamb did state in his Memorandum that the British High Commission had gathered through its Greek-Armenian section a large mass of information concerning the 118 prisoners on Malta and some 1000 others, all alleged to have been directly or indirectly guilty of participation in massacres. Despite his concerns, Lamb concluded, "[i]t is safe to say that very few 'dossiers,' as they now stand, would not be marked 'no case' by a practical lawyer."<sup>241</sup>

Perhaps the most difficult evidentiary problem was the inability of the British to gather incriminating evidence held by the Turkish government.

238. FO 371/6500/, W. 2178, appendix A (folio 385-118, 386-119), Aug. 11, 1920.

239. *Id.* In discussing the evidentiary difficulties, Lamb stated further: "Though none of this information is in itself of strict legal value, still no prosecution could get to work without it." *Id.*

240. FO 371/6500/E3557 (folios 63-64).

241. *Id.* (folio 385-118).

As W.S. Edmonds, Undersecretary in the Eastern Department of the Foreign Office, observed on August 3, 1921, "there is probably some evidence in the archives of the [Turkish] court martial at Constantinople [but] the really important documents could no doubt be smuggled away before we begin to examine them."<sup>242</sup> On August 10, 1921, the British Secretary of State expressed his agreement with this view to the High Commissioner in Istanbul, adding that it would be "useless" to seek help from the French in exacting justice against the war criminals, considering "the general attitude observed by the French Government as regards Turkey."<sup>243</sup> Similarly, British judge Lindsey Smith asserted his belief that "a considerable amount of incriminating evidence was collected by the Turkish Government but it is idle to expect to get it. The only alternative is, therefore, to retain them as hostages only and release them against British prisoners." He recommended, therefore, the abandonment of the plans to prosecute the Malta prisoners. As he judged, "an abortive trial would do more harm than good."<sup>244</sup>

### 3. *The Ultimate Suspension of Prosecution*

In the end, the May 24, 1915 Allied declaration proved the *brutum fulmen* (empty, hollow threat) of the entire episode; retributive justice gave way to political accommodation. Abandoned by their allies, and pressured domestically to seek the release of some British prisoners held hostage by the Kemalists (who had gained national, political, and military ascendancy), the British sought a deal with Kemalist representatives for the total release of the Malta detainees. Mustafa Kemal refused, however, to honor the former government's Exchange Agreement of March 16, 1921,<sup>245</sup> since this agreement had excluded several Ittihadists implicated in Armenian massacres, as well as eight others accused of mistreating British prisoners during the War. Instead, new Foreign Minister Yusuf Kemal (Tengirsek) pressed for an "all for all" exchange.<sup>246</sup> Meanwhile, sixteen Ittihadists excluded from the exchange and slated for trial before an International Tribunal had collectively fled from Malta on September 6, 1921, following an initial, partial exchange.<sup>247</sup> This group included two army commanders, four governors, one district commissioner, one deputy and Şükrü Kaya, the wartime Director of Deportations. Two other prisoners who would have been candidates for trial,

242. FO 371/6509/E8745 (folios 23-24).

243. *Id.* (folio 29).

244. FO 371/6509/E10023 (folios 100-01) (Aug. 24, 1921 opinion).

245. FO 371/6500/E3375 (folio 284/15).

246. FO 371/6509 (folio 47) (Aug. 4, 1921 summary of the negotiations); B. ŞİMŞİR, *supra* note 227, at 447.

247. FO 371/6509/E10319 (folios 122-23).



labelled "the most notorious members of the group," (one of whom was Tahir Cevdet, the former Governor of Van) had escaped earlier.<sup>248</sup> In a final opinion relayed to the Cabinet, the Law Officers of the Crown argued that for the reasons described above, the Turks could not be tried and found guilty, and that the only remedy was the implementation of the Sèvres Treaty.<sup>249</sup>

The "all for all" exchange agreement ensued on October 23, 1921, and the remaining fifty-three Turks were released on November 1, 1921. British shame and guilt set in immediately afterwards. Calling some of the Turks whom they had set free "notorious exterminators" of Armenians,<sup>250</sup> the British officials involved in the negotiations and decision-making appended their reactions to the relevant documents. Foreign Minister Curzon scolded himself for having made "a great mistake" in pushing for the release of the Turks from British custody; he attributed his act "to a pressure which I always felt to be mistaken." Another British official commented as follows:

The less we say about these people the better. . . I had to explain why we released the Turkish deportees from Malta, skating over thin ice as quickly as I could. There would have been a row I think. . . . [T]he staunch belief among Members [of the Parliament is] that one British prisoner is worth a shipload of Turks, and so the exchange was excused.<sup>251</sup>

#### 4. *A Commentary on the Abortiveness of Allied Justice*

From a strictly legal point of view, the British failure to bring the Malta detainees to trial before a national or international tribunal was due to evidentiary problems resulting from a lack of prosecutorial powers and jurisdictional competence. These constraints were, however, self-imposed on two accounts. First, the Allies did not assert their belligerent status strongly from the very start through a complete occupation and

248. FO 371/5091/E16080 (folio 85). In announcing this escape the British Foreign Office noted that the first two "have broken parole"; on the occasion of the subsequent escape of the 16, the Office wondered out loud "how little Turkish sense of honor can be relied on." FO 3071/6509/E10662 (folio 159).

249. J. WILLIS, *supra* note 12, at 162.

250. FO 371/7882/E4425 (comment by D. Osborne, May 23, 1922).

251. FO 371/7882/E4425 (folio 182). This attitude is also evident in the remark General Campbell inserted in his letter to Lloyd George, whom he was pressuring for the release of his son, Captain Campbell, from Turkish custody. Captain Campbell had written his father, who repeated it to Lloyd George, "I am more valuable than any of these miserable Turks." FO 371/6509/E8562 (folio 16). But a major source of pressure was the maneuvering of Winston Churchill, then Secretary of State for War, who persuaded the Cabinet to adopt a lenient attitude toward "less guilty Turks." J. WILLIS, *supra* note 12 at 160. It is equally significant that one of the Turkish internees gleefully stated after his release that the British were duped by "a sly trick" of the Ankara government whose "British prisoners" to be exchanged included "six Maltese laborers and their Greek wives and children." A. YALMAN, *TURKEY IN MY TIME* 106 (1956).

control of Turkey, as was done in Germany and Japan at the end of World War II. Second, they studiously refrained from any involvement in the Turkish Courts Martial prosecutions.

The British statements on the relative worth of Turks and Britons quoted above epitomizes the subversion of justice by national and international politics. The May 24, 1915 Allied declaration was, to a considerable degree, a politically motivated act akin to the nineteenth-century tradition of proclaiming the doctrine of humanitarian intervention on behalf of oppressed nationalities and minorities. Though that declaration, cited through the end of the War,<sup>252</sup> served as the forerunner of the principle of "crimes against humanity and civilization" adopted by the Nuremberg Charter (article 6c) and the U.N. Convention on Genocide (preamble), it proved ephemeral in the case of the Armenian genocide. In this sense, the declaration suffered the fate of many rules of international law that declare general principles but lack compulsory force. As victors who had exacted from the vanquished a virtually unconditional surrender, however, the Allies missed a rare opportunity to create with their May 24 declaration a new touchstone of international jurisprudence calling for the application of force in cases involving organized mass murder.<sup>253</sup> The Sèvres Treaty, signed by the representatives of the Ottoman government, had included the rudiments of such an international jurisprudence. As noted above, however, the treaty was jettisoned as the victors chose political gain over effectation of their promises and principles.

The ascendancy of Kemalism may be traced directly to the consequences of certain clauses in the Armistice of 1918<sup>254</sup> which allowed Turkey to escape total Allied occupation, to maintain and refurbish a number of Army Corps and associated divisions and their staffs, and to effectively sabotage the stipulated processes of demobilization and disarmament. Above all, the Allies left the Ottoman state system intact,

252. Less than three months before the onset of the Turkish Armistice, French Premier Clemenceau publicly declared that France and Great Britain intend to secure justice for the Armenians "*selon les règles supérieures de l'Humanité et de la justice.*" K. ZIEMKE, *supra* note 118, at 273 (Letter from Clemenceau to Armenian National Delegation, Paris, July 14, 1918). See also THE AMERICAN COMMITTEE OPPOSED TO THE LAUSANNE TREATY, THE LAUSANNE TREATY, TURKEY AND ARMENIA 195 (1926). Echoing the May 24 Allied declaration, this pledge proved as inconsequential as its predecessor. The forsaking of Armenia and Armenian claims was a classic instance of adaptive politics in which the military challenge of the vanquished paradoxically emerged as the determining factor in the capitulation of the victors. Lloyd George decried that capitulation by excoriating the Lausanne Peace Treaty, in which neither Turkish war crimes nor Armenia were mentioned, as "abject, cowardly and infamous." D. LLOYD GEORGE, *supra* note 89, at 872.

253. See Brierly, *supra* note 70.

254. See E. MEARS, *supra* note 234, at 624-26; BRITISH GENERAL STAFF FILES, W.O. 100, EXECUTION OF THE ARMISTICE WITH TURKEY app. I (30 Oct.—30 Nov. 1918). Some of these key clauses were Nos. 5, 16, and 20.

granting it *de facto* and *de jure* sovereign rights. In so doing, the Allies relinquished the power needed to carry out the pledges contained in the 1915 Allied Note.

The failure of the Allied prosecutorial efforts illustrates the inherent weakness of international law as a deterrent to crimes committed by sovereign governments. The political and practical limitations that exist in a system that respects independent state sovereignty will almost always prove more tenacious than the call for humanitarian intervention. The Armenian genocide was not punished through international efforts. We now turn to the domestic efforts within Turkey to obtain retribution.

### B. *The Recourse to the Machinery of Turkish Justice*

The efforts to prosecute those responsible for the Armenian genocide under Turkish domestic law also faltered as a result of domestic and international political considerations. The Turkish trials were successful in documenting the crimes that had been committed against the Armenian people. They failed dismally, however, in punishing the war criminals. Domestically, the rise of a strong nationalist movement, led by Mustafa Kemal, conflicted with legal efforts to prosecute Turkish military and government officials. The nationalist aspirations of unity and national pride were inconsistent with the internal impulse to fix blame and apportion responsibility for the Armenian genocide on Turkish leaders. In the international sphere, political considerations outweighed the Allies' desire to force the Turks to acknowledge and effectively prosecute the war criminals. In their zest to win favor with the Kemalist government, France and Italy undermined the efforts of Britain, and to a lesser extent the United States, to bring about retributive justice for the Armenians through the use of the Turkish Courts. Britain, lacking the support of her allies and facing Turkish opposition, eventually sacrificed the pursuit of justice to political expediency.

A parallel can be drawn between the Istanbul and Leipzig trials, where the German war criminals were prosecuted. At Leipzig, domestic and international forces combined to thwart efforts to prosecute alleged war criminals. As with Turkey, nationalist feelings in Germany militated against prosecuting one's own nationals, especially under foreign pressure. The Allies, during both the Turkish and Leipzig trials, allowed political considerations to prevail over the efforts to prosecute the enemy's officials. The Leipzig parallel shows that the failure of the Turkish domestic efforts should not be seen as an exception. Rather, their joint lesson is that it is difficult to achieve effective punishment for genocide and other crimes against humanity through domestic processes.

Although ultimately ineffectual, the prosecution of the Turkish leaders implicated in the Armenian Genocide before Turkish Courts Martial, which resulted in a series of indictments, verdicts and sentences, was of extraordinary, though unrecognized, significance. For the first time in history, deliberate mass murder, designated "a crime under international law,"<sup>255</sup> was adjudicated in accordance with domestic penal codes, thus substituting national laws for the rules of international law. These trials, therefore, provide a perspective on the developing efforts to criminalize genocide under domestic laws. In 1949, the Special ABA Committee on Peace and Law through the United Nations, defined the U.N. Convention on Genocide as "a code of domestic crimes which are already denominated in all countries as common law crimes."<sup>256</sup> Lemkin likewise asserted that "genocide is a composite crime and consists of acts which are themselves punishable by most existing legislation."<sup>257</sup>

In 1988, Congress added the crimes of genocide and attempted genocide to the U.S. criminal code. Such legislative efforts, however, can only be effective to the degree that they are enforced. As noted above, international and domestic political structures work against such enforcement. In post-World War I Turkey, however, there were countervailing pressures which could have provided enough momentum for the initiation and ultimate success of enforcement efforts. By agreeing to try Turkish war criminals, the Ottoman authorities expected to be treated less sternly at the Peace Conference, a fact confirmed by both contemporary Turkish historians<sup>258</sup> and British officials involved.<sup>259</sup> These Ottoman authorities reasoned that the Turkish nation could not be held responsible for the crimes of a political party and its governmental agents. Commenting on the first sentence of capital punishment imposed by the Turkish Military Tribunal, British High Commissioner Admiral Calthorpe maintained that the Turks, including the Grand Vezir and his supporters, "consider executions a mere concession to the Entente rather than as punishment justly meted out to criminals."<sup>260</sup>

255. Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J. INT'L. L. 150 (1947).

256. Finch, *The Genocide Convention*, 43 AM. J. INT'L. L. 735 (1949).

257. Lemkin, *supra* note 255, at 150.

258. S. AĞSIN, *İSTANBUL HÜKÜMETLERİ VE MİLLİ MÜCADELE* (The Istanbul Governments and the National Struggle) 140-41 (1983); 4 İ. DANIŞMEND, *İZAHLI OSMANLI TARİHİ KRONOLOJİSİ* (The Annotated Chronology of Ottoman History) 457 (2d ed. 1961).

259. FO 371/4173/44216, folio 51 (Mar. 20, 1919, report by W. H. Deedes). In folio 50, Deedes explicitly states the official British position of non-interference in Turkey's internal affairs.

260. FO 608/246, folios 654, 656, cipher No. 799 A (Apr. 19, 1919).

In addition, the surreptitious flight in November, 1918 of the principal architects of the Armenian genocide created a furor among many sectors of the Turkish public still suffering the hardships of war and defeat. The anti-Ittihadist factions that had been persecuted and oppressed before and during the war demanded speedy trials. Others, including many journalists, simply lamented the atrocities perpetrated against the Armenians. For example, the journal *Minber*, published by F. Okyar, Interior Minister in the first post-war Cabinet and subsequently Prime Minister of the Turkish Republic from 1924-25, denounced "the extermination of the Armenians as sheer madness."<sup>261</sup> Thus, the domestic trials against the perpetrators of the Armenian genocide were not without political, public, and media support within Turkey. The failure of these trials, therefore, is doubly instructive.

### 1. *Pretrial Inquiries and Investigations*

#### a. *The Parliament's Fifth Committee*

Article 31 of the Ottoman Constitution detailed procedures through which one or more Deputies could lodge allegations of misconduct against a Minister. These allegations ultimately would lead to a trial before the High Court, whose composition, jurisdiction, and function were spelled out in articles 92-95. If a Committee of the Chamber of Deputies decided to investigate the allegations, the Constitution required a two-thirds vote of the full Chamber and the sanction of the Sovereign for an actual trial.

On the very day the seven top leaders of Ittihad fled from Istanbul (November 1-2, 1918),<sup>262</sup> a Muslim Deputy introduced a motion for the trial before the High Court of the two wartime Cabinet Ministers. He attached to that motion ten charges against these Ministers referring to their misdeeds related to the Turkish participation in World War I, including aggression, military incompetence, political abuses, and economic crimes. Two of these charges related to the Armenian massacres. Number 5 challenged the enactment of the Temporary Laws<sup>263</sup> as "completely contrary to the spirit and letter of our Constitution." In denouncing "the disasters" that followed this enactment, and the associated "orders and instructions," the Deputy invoked "the rules of law and hu-

261. A.A. TÜRKİ 167/14, at VI (Istanbul German Embassy review of Turkish press, based on reproduction in *Le Soir* (French language Istanbul daily) (Nov. 12, 1918). But Armenian-language papers give the date of the original article in *Minber* (Istanbul) as November 9, 1918.

262. See A. YALMAN, *supra* note 180, at 314-15.

263. See *supra* text accompanying note 144; WAR CABINET'S HEARINGS, *supra* note 144, at 6, 7.

manity." Charge No. 10 indicted the Ministers for the creation of "brigands [*çetes*] whose assaults on life, property and honor rendered the Ministers guilty as co-perpetrators of the tragic crimes that resulted."<sup>264</sup>

To investigate these charges, the Fifth Committee of the Chamber of Deputies was created, its members having been selected by the drawing of lots. Its slow pace and digressions, however, gave rise to public complaints. Further, by the time of the full Chamber's vote to institute High Court trials, only 156 Deputies remained of the 256 who had been elected before the war; the corresponding ratio for the Senate was 30 out of 48.

In response to these concerns, the Sultan dissolved the Chamber on December 21, 1918, and transferred jurisdiction to the Courts Martial. The Sultan's action precluded High Court jurisdiction, since there was no Chamber to vote on the findings of the Fifth Committee and to recommend trials under the jurisdiction of that Court. This move also served the political interests of the Sultan by cutting off the Ittihadists' power and giving the Sultan's government a free hand to control the country by edict.

Notwithstanding the preemption of its procedural sequence, the Fifth Committee's work had already yielded some results. From November 9 to December 12, 1918, the Committee conducted fourteen hearings in which it interrogated fifteen ministers, including two Şeyhulislams.<sup>265</sup> These interrogations resulted in a number of important admissions. For example, former Justice Minister Ibrahim admitted to the release from the prisons of "an appreciably large number of convicted common law criminals upon the instance of the Army claiming to be needing them."<sup>266</sup> Ibrahim further accepted responsibility for the atrocities resulting from the Temporary Law of Deportation, collectively for the Cabinet, and individually as a Minister, although he argued that the excesses were perpetrated "without the knowledge of the government."<sup>267</sup> When a Deputy retorted, "What do you mean 'the government was not cognizant of them, the problem did not occur in one day, but dragged on for eighteen months,'" Ibrahim shifted the blame to the military, which in turn persistently denied "the vile deeds."<sup>268</sup> Another Deputy raised the

264. *Id.* (referring to the Special Organization). The Deputy was Fuad, who represented the Divaniye district. His motion was drafted on October 28, submitted on November 2, and entertained on November 4, 1918.

Fuad was part of that group of Arab Deputies in the Ottoman Parliament which, unlike any other group, boldly pursued the task of holding high ranking officials accountable for the crimes against the Armenians; this was most evident during the Fifth Committee hearings.

265. *Id.* at 3-4.

266. *Id.* at 537.

267. *Id.* at 534-35.

268. *Id.* at 520.

question of the military “willfully carrying out deportations and executions in areas outside the theaters of military operations.” To this the ex-Minister of Justice responded, “we are unaware of such things.”<sup>269</sup>

In addition to the revelations and confessions exacted from the ministers during these hearings, the Committee also secured a number of documents, some of which were top-secret orders and instructions regarding the massacres. These documents were eventually turned over to the prosecutors attached to the Courts Martial.<sup>270</sup>

### b. *The Administration's Inquiry Commission*

The Administration's Inquiry Commission, which came into being on November 23, 1918 and operated concurrently with the Parliamentary investigation, was charged with the investigation of the misdeeds (*seyyiat*) of governmental officials irrespective of rank. As mandated by paragraphs 47, 75 and 87 of the Ottoman Code of Criminal Procedures,<sup>271</sup> the Commission, headed by Hasan Mazhar, was vested with broad powers. These powers, including subpoena, search and seizure, and arrest and detention, were executed by the judicial police and the agency of the Military Governor. Over two months, the Commission secured coded and decoded telegraphic orders from dozens of provincial locations identified as centers of deportations and massacres in Asiatic and European Turkey. The Commission obtained a batch of forty-two ciphers from the Ankara province alone. In addition, the Commission compiled a mass of pre-trial evidence through interrogatories administered orally and in writing to suspects. Among these suspects were twenty-six Chamber Deputies whose possible escape was averted by a Cabinet order denying them permits to travel to their electoral districts.<sup>272</sup> Through a set of ten questions directed to the Defense Ministry, the Commission also sought information on the organization, function, command, and control of the Special Organization.

When finished with its task, the Commission forwarded to the Courts Martial the dossiers of the suspects; by mid-January, 1919, it had compiled separate dossiers for 130 suspects.<sup>273</sup> This transfer of pre-trial evidence was accompanied by a recommendation, as stipulated by the Criminal Procedure Code, that evidence was incriminating enough to

269. *Id.* at 523.

270. 1 M. GÖKBILGIN, *MILLÎ MÜCADELE BAŞLARKEN* (As the National Struggle Began) 57 (1959).

271. 7 G. YOUNG, *CORPS DE DROIT OTTOMAN, CODE DE PROCÉDURE PÉNALE* (Treatise of Ottoman Law, Code of Criminal Procedure) 235, 239, 241 (1906).

272. FO 371/4141/49194, at 4 (part II of extensive, six-part report of British Saloniki Force Intelligence Section, Mar. 8, 1919).

273. United States National Archives, Record Group 256, 867.00/59, at 3 (U.S. Commissioner at Istanbul Lewis Hecks' January 20, 1919 report to the State Dept.).

warrant the commencement of criminal proceedings against the suspects.<sup>274</sup>

## 2. *The Formation of the Court Martial*

The next steps of martial justice originated in early December, 1918 from the office of the Procuror-General of the Court of Appeals in the Ottoman capital, and were subsequently formalized in a conference between the head of the Criminal Affairs division of the Justice Ministry and the Chief Legal Counsel of the Interior Ministry.<sup>275</sup> The Court Martial was initially formed by Imperial authorization on December 16, 1918.<sup>276</sup> A subsequent authorization, dated December 25, 1918, declared that jurisdiction for areas not under martial law would devolve upon existing criminal courts as stipulated by article 88 of the Constitution.<sup>277</sup> A third decision, dated January 8, 1919, rendered the Extraordinary (or Special) Court Martial operational.<sup>278</sup> In March, however, the Sultan installed a new government which he believed would bring about a more efficient and expedited trial of the accused; by Imperial authorization, the statutes of a new Court Martial were set forth on March 8, 1919.<sup>279</sup> The "principal task of this Tribunal" was the investigation of the charges of "massacres and unlawful, personal profiteering."<sup>280</sup> On May 26, 1919, the new Procuror-General framed a new indictment which added more comprehensive allegations, centering around the main charge of "overthrow of the government (*taklibi hükümet*)."<sup>281</sup> This revision was in line with the terms of paragraph 311 of the Code of Criminal Procedures providing for the amendment of charges in the event that new crimes should come to light during a trial.<sup>282</sup> Finally, on April 23, 1920, the charges were expanded to include "rebellion" and "violation of public order."<sup>283</sup>

274. G. YOUNG, *supra* note 271, at 247.

275. M. GÖKBILGIN, *supra* note 270, at 15.

276. TAKVIMI VEKAYI, No. 3424.

277. TAKVIMI VEKAYI, No. 3430.

278. TAKVIMI VEKAYI, No. 3445.

279. There were two formations of the Court Martial in March 1919: (1) March 8, presided over by Fevzi Paşa. R.G. 256, 867.00/27, R.G. 59, 867.4011/408; TAKVIMI VEKAYI, No. 3493. (2) March 19, presided over by Nazım Paşa, JOURNAL D'ORIENT (Istanbul), Apr. 23, 1919; TAKVIMI VEKAYI, No. 3503. Pursuant to the provision of art. 371 of the Ottoman Code of Criminal Procedures, the Court Martial ordered the seven top leaders of the Young Turk regime "presently being fugitives," to appear before the Court within ten days. Otherwise, they would be treated as rebels against the law, tried in absentia, lose all their civil rights, and their properties would be confiscated without right to appeal. JOURNAL D'ORIENT (Istanbul), Apr. 15, 1919, at 1.

280. TAKVIMI VEKAYI, No. 3540, May 5, 1919, at 8.

281. TAKVIMI VEKAYI, No. 3571, June 13, 1919, at 128.

282. G. YOUNG, *supra* note 271, at 273.

283. TAKVIMI VEKAYI, No. 3837.



### 3. *The Initiation of the Proceedings*

The evidence obtained in preparation for the trials was indexed and cross-indexed along the lines of (1) *ratione personae*, or accomplices (*cerayim failleri*), (2) *ratione loci*, or location of the crimes and (3) *ratione materiae*, involving the classification and itemization of the evidence. The Court Martial adopted broad standards concerning the laws of evidence. Relying on longstanding Ottoman judicial tradition, it applied the principle of "intimate conviction" (*hukuku takdiriye*, or *kanaati vicdaniye*), by which a judge can, to the best of his conscience, assess the probative value of the evidence available to him. Further, nearly every document obtained by the Inquiry Commission was authenticated by the legal experts of the Interior Ministry with the standard notation of "it conforms to the original" (*aslina muafik* or *mutabik*). In the seventh, eighth, and ninth sittings of the Yozgat trial series, which were held previously, several of the military cipher-telegrams were introduced as prosecution exhibits and, as with all prosecution exhibits, read aloud in court. The presiding judge also decided to allow public trials, stating that while "[i]t is not customary, nor is there any legal obligation for a Court Martial, to allow the proceedings to be public. . . . In order to demonstrate the intent of the Court to conduct the trials impartially and in a spirit of lofty justice [*kemali adil ve bitaraf*], I am going to use judicial discretion and conduct public trials. The Court is simply trying to help the defendants and facilitate their defense [*teshil ve istiane*]."284

The defense, coordinated during the "Cabinet Council" sessions that were held in the prison, amounted to a form of stonewalling: individually and collectively, the defendants steadfastly denied the charges.<sup>285</sup> In trying to overcome this defense, the Military Tribunal used three methods: (1) surprising the defendants through the sudden production of cipher telegrams bearing their signatures; (2) confronting them with their statements and confessions from the oral and written pretrial interrogatories they had signed;<sup>286</sup> and (3) isolating a defendant at the dock and rigorously questioning him. The admissions extracted were then used in

284. TAKVİMİ VEKAYİ, No. 3540, May 5, 1919, at 4.

285. This denial prompted Aka Gündüz (Enis Avni), the celebrated nationalist writer, to mock them in an article imitating their defense style, "Oh alas, oh alas, oh alas, oh alas. We didn't see, we didn't know, we didn't hear" (*Vah vah, vah vah. görmüyorduk, bilmiyorduk, işitmiyorduk*). ALEMDAR (Istanbul), May 10, 1919. For a description of "Cabinet Council" sessions, see *infra* note 366.

286. Ottoman criminal procedure codes stipulated secrecy in the trial preparations; defense counsel were therefore barred from access to the pre-trial investigatory files and from accompanying their clients to the interrogations conducted as preparatory to the trials. The discretionary powers of the presiding judge of a criminal court are set forth in the Code of Criminal Procedure articles 232-34 and address the matters of reliance on one's conscience in the quest for probative evidence, including the authority to hear witnesses whose testimony is "informational" and whose oath-taking can be dispensed with. G. YOUNG, *supra* note 271, at

the examination of the other defendants, leading some of the defendants to amend their testimony.

#### 4. *The Key Indictment*

Although separate indictments were framed for the series of subsidiary trials on massacres which took place in different locales, the Key Indictment focused on the Cabinet Ministers and the top leaders of the ruling Ittihad party. The League For the Defense of Ottoman Interests pointed to this indictment as "a historical document" through which "the country" will be tried and judged.<sup>287</sup> The cardinal feature of the Key Indictment, not present in any other indictment, was the set of documents lodged within it. In support of the charges spelled out, the Indictment cited forty-one specific documents in the possession of the Court. Most of these documents consisted of decoded telegrams sent to and from the Interior Minister, the IIIrd and IVth Army Commanders, the Deputy Commanders of the Vth Army Corps and the XVth Division from Ankara province, (both of whom subsequently testified regarding their ciphers), the Directors of the Special Organization, two Military Governors of Istanbul, and a host of governors and district commissioners.

##### a. *The charges*

The charges in the indictment centered on the Ittihad party, sometimes called *Cemiyet* (meaning a close knit community of party members). In declaring the party's objectives and methods criminal, the Procuror-General specifically cited its Central Committee, General Assembly, and two provincial control groups headed by Responsible Secretaries and Inspectors. The Defense Ministry, the War Office (particularly the Special Organization), and the Interior Ministry were likewise included in these charges since they were all led and directed by the two principal chiefs of the party, War Minister Enver and Interior Minister (later Grand Vezir) Talat.<sup>288</sup> "The evidence gathered yields the picture of a party whose moral personality is mired in an unending chain

261-62. Article 269 of the same code provides for new judicial measures in case of detection of discrepancies or inconsistencies between pre-trial depositions and court testimony. *Id.* at 266.

287. LE COURRIER DE TURQUIE (Istanbul), Apr. 30, 1919. An editorial in a Turkish daily described the impending court martial proceedings against high-ranking officials and party leaders as "the most important trial in the six-hundred year history of the Ottoman empire." Hadisat (Istanbul), Apr. 26, 1919.

288. The entire discussion of the Indictment is based on the text as published in TAKVIMI VEKAYI, No. 3540; the citations are from 4-8 of that issue. It is noteworthy that American Ambassador Morgenthau in a lengthy analysis (Nov. 4, 1915) of the omnipotence of the Central Committee of the Young Turk Ittihad party, mentions these men as the arch leaders of "an invisible and irresponsible government." That omnipotence with particular reference to organizing the "Armenian atrocities," is accounted for in terms of an

of bloodthirstiness, plunder and abuses.”<sup>289</sup> The principle charges are discussed below.

### i. *Conspiracy*

This charge was two-pronged: the defendants were first accused of having deliberately engineered Turkey’s entry into the war “by recourse to a number of vile tricks and deceitful means”; they were also accused of using “this vantage ground to carry out their secret intentions.”<sup>290</sup> In accord with a central plan, the indictment stated, the party proceeded to implement its “covert and conspiratorial” goals.<sup>291</sup> The conspiracy was thus extended to the point of subverting the legitimate authority of the government whose “high ranking officials submitted” (*inkiyad*) to the dictates of the party.<sup>292</sup> The principal objective of Ittihad was “the massacre and destruction of the Armenians”<sup>293</sup> for which purpose they further conspired to “release gangs of convicts from the prisons,”<sup>294</sup> ostensibly for combat duty. In reality, “the prisons were emptied . . . of these criminals and outlaws”; they were then assigned “massacre” duties in the Special Organization.<sup>295</sup> The indictment alleged that the conspiracy included self-enrichment not only for the members of the units but also for the principal leaders of the party who “likewise tried to pile up fortunes” for themselves through “the pillage and plunder” of the goods and possessions of their victims.<sup>296</sup> In this way, the indictment emphasized that “the investigation of massacres and illegal, personal profiteering is the principal task of this Tribunal” (*cümlei vazife*).<sup>297</sup> The provincial organization and supervision of the plan of “extermination” was entrusted to the Responsible Secretaries, carefully selected by the party leadership.<sup>298</sup>

absolute control of the army, navy and civil government of the country. They have removed many governors of interior *vilayets* [provinces] who would not obey their orders. They also completely control the Chamber of Deputies, whose members are absolutely selected by them. . . they have frightened almost everyone into submission. . . There is no opposition party in existence. The Press is carefully censored and must obey the wishes of the Union and Progress Party. . . They have annihilated or displaced at least two thirds of the Armenian population. . . .

R.G. (L.) 59, 867.00/797 1/2; L. at 762-66. On December 1, 1915, Morgenthau changed his language in a report to Sec. of State Lansing to use the words “the destruction of the Armenians” as a near completed fact. R.G. (L.) 59, 867.00/799 1/2; L. at 771.

289. TAKVIMI VEKAYI, No. 3540, at 4.

290. *Id.*

291. *Id.*

292. *Id.* at 7.

293. *Id.* at 6.

294. *Id.* at 5.

295. *Id.*

296. *Id.* at 4.

297. *Id.* at 8.

298. *Id.* at 6.

ii. *Premeditation and Intent*

The Indictment further alleged that "[t]he massacre and destruction of the Armenians were the result of decisions by the Central Committee of Ittihad."<sup>299</sup> The decision process involved "extensive and profound deliberations," in consequence of which the scheme against the Armenians "has been determined upon."<sup>300</sup> In order to conceal that decision, the Indictment maintained, Ittihad leaders relied on the party's tactic of "disguise." The execution of the central plan was "ensured and directed through oral and secret orders and instructions."<sup>301</sup> These orders, sent via coded ciphers, were always accompanied by the instruction to "destroy" (*iptal*) them after reading.<sup>302</sup>

On the issue of intent, the Indictment countered two possibilities that were later advanced by the defense. One was military necessity, which the defense argued necessitated massive relocation through deportations; the other was the justified punishment of a disloyal community. The Indictment asserted that "the deportations were neither a measure of military necessity, nor a punitive, disciplinary act."<sup>303</sup> Rather, they entailed "massacres . . . as acts subsidiary to a centrally directed plan."<sup>304</sup> That plan had nothing to do with "a particular incident" provoked by the Armenians nor were the massacres "limited to a particular locality."<sup>305</sup> The Indictment's allusion to a comprehensive and centrally directed plan of destruction was based on Ittihad's overt purpose of "solving once and for all (*hall ve fasl*) unresolved problems and conflicts" of which Ittihad considered the lingering Armenian question the most troublesome.<sup>306</sup> The Indictment cited as proof the Ittihad Central Committee's intent of "solving the Eastern question."<sup>307</sup> The plan of wholesale destruction was eventually confirmed in two separate verdicts: (1) one was based upon a cipher telegram in which the Chief of the Special Organization asked the Responsible Secretary of Harput province whether the Armenians of his province "are being annihilated, or are

299. *Id.* at 8.

300. *Id.* The August 3, 1915 entry of American Ambassador Morgenthau's diary reads, "Talat . . . told me that the Union and Progress Committee [Ittihad party] had carefully considered the matter in all its details and that the policy which was being pursued was that which they had officially adopted. He said that I must not get the idea that the deportations had been decided upon hastily; in reality, they were the result of prolonged and careful deliberation." H. MORGENTHAU, *supra* note 23, at 333.

301. TAKVIMI VEKAYI, No. 3540, at 5.

302. *Id.* at 6.

303. *Id.*

304. *Id.* at 7.

305. *Id.* at 6.

306. *Id.* at 4.

307. *Id.* at 8.

they being merely deported and exiled”;<sup>308</sup> and (2) documentary evidence was adduced to substantiate the charge that Ittihad party Chief and Interior Minister Talat had given oral instructions to interpret the order for “deportation” as an order for “destruction” (*imha*).<sup>309</sup>

The military commander in whose command zone the massacres were carried out substantiated these charges of premeditation and intent. When informed that a contingent of 2000 Armenian soldiers assigned to labor battalion duties were trapped and slaughtered on their way to a new assignment on the Baghdad Railroad, General Vehib of the IIIrd Army’s command zone launched an investigation that led to a court-martial and some executions. It was in the course of this investigation that General Vehib learned of the large-scale massacres that had taken place in the six provinces of the IIIrd Army’s command zone in the months preceding his assuming command in February, 1916. In his detailed affidavit prepared at the request of the Administration’s Inquiry Commission and repeatedly cited in the Key Indictment and two Verdicts, Vehib summed up his findings as follows:

The massacre and destruction of the Armenians and the plunder and pillage of their goods were the results of decisions reached by Ittihad’s Central Committee. . . . The atrocities were carried out under a program that was determined upon and involved a definite case of premeditation (*mukarrer bir program ve mutlak bir kasd tahtında yapılan işbu mezalim*). It was [also] ascertained that these atrocities and crimes were encouraged (*teşvik*) by the district attorneys whose dereliction of judicial duties in face of their occurrence and especially their remaining indifferent (*lâkayd*) renders them accessories to these crimes (*feren zimethal*).<sup>310</sup>

### iii. Murder and Personal Responsibility

The top leaders of Ittihad were also accused of having committed statutory crimes in their capacity as members of the party’s Central Committee. Two members of the triumvirate, Enver (the War Minister and de

308. TAKVİMİ VEKAYİ, No. 3771, Feb. 9, 1919, at 2.

309. TAKVİMİ VEKAYİ, No. 3772, Feb. 10, 1919, at 5.

310. Vehib’s affidavit (dated Dec. 5, 1918) was read in its entirety at the second sitting of the Trabzon trial series (March 29, 1919). Portions of it were incorporated in (1) the Key Indictment, TAKVİMİ VEKAYİ, No. 3540, May 5, 1919, at 7, with which the 12 page, handwritten document was lodged, (2) the Harput verdict, TAKVİMİ VEKAYİ, No. 3771, Feb. 9, 1919, at 1, and (3) LE COURRIER DE TURQUIE, Apr. 1 and 2, 1919. The copy of the full text in its original Ottoman Turkish is in the Jerusalem Armenian Patriarchate Archive, indexed under the Armenian alphabet character H (pronounced Ho, the 16th letter, and not its variant Hee, the 21st), at 171-182 of the “H” file. The citation used here is from page 5 of the affidavit whose rough Armenian translation is in *Hairenik*, Apr. 13, 1968. The details of the Court Martial set up by General Vehib are in *Ariamard*, Dec. 10, 1918, including the text in Ottoman Turkish of the General’s proclamation through which he informed, as a warning, his Third Army units of the verdict of the court and the execution of the gendarmery commander involved.

facto Supreme Commander of Ottoman Armed Forces), and Cemal (the Marine Minister and Commander of the IVth Army), were military leaders. Talat, the third member, was Interior Minister and the ultimate coordinator of the Special Organization's ties with the party's Central Committee and the War Office. Both the Military Governors of Istanbul attached to the War Office, and the head of Public Security were prominently mentioned in the Indictment as organizers of the Special Organization cadres in the Ottoman capital. The most prominently mentioned Ittihad Central Committee members were the two physician-politicians, Nazim and Şakir. The Indictment cited both of them eight times as the foremost organizers of the Special Organization,<sup>311</sup> which itself was cited a dozen times as the principal tool used in association with the crimes of "murder, arson, gutting, rape, and all sorts of torture."<sup>312</sup>

The Responsible Secretaries were identified as the key group directing these crimes.<sup>313</sup> For this reason, the Military Tribunal remanded their case to a separate series of trials after repeatedly underscoring their pivotal role in the Key Indictment. In the separate and subsidiary Indictment, framed for this series, the Court depicted the participation of these provincial commissars in "the decision of the Central Committee. . . [in that t]hey created a secret arm of the government and subverted that government [*tagayyür*], operating within the party as a special cadre of high ranking officials [*erkânı mahsusa*]."<sup>314</sup> In describing their role in the destruction of the victims under the cloak of "deportation," the Procuror-General in his closing argument described these deportations as "a pretext for the massacres," adding "[t]his established fact is as clear as the equation  $2 + 2 = 4$ ."<sup>315</sup> The Indictment concluded that as the crimes were specified as "personal" (*şahsi ceraim*) or "ordinary" (*ceraimi*

311. For a detailed discussion of the leading role of these two party leaders, see Dadrian, *The Role of Turkish Physicians in the World War I Genocide of the Armenians*, 1 HOLOCAUST & GENOCIDE STUD. 169-92 (1986).

312. TAKVİMİ VEKAYI, No. 3540, at 4-8.

313. The following description by a Turkish author remarkably familiar with many of the secrets of Ittihad and the Special Organization may help to underline the importance of this role, somewhat akin to that played by the *Gauleiters* of Nazi Third Reich:

The title [Responsible Secretary] was created to avoid the appearance of overshadowing the state authority while investing the holder with powers required for the direction of the course of events. In fact, in all matters of consequence, *the last decision* belongs to them. These men . . . in line with this practice made *final decisions*. they were selected by the Central Committee, the shadow Cabinet, on the basis of experience, age, brains and familiarity.

C. KUTAY, CELAL BAYARIN YAZMADIĞI VE YAZMAYACAĞI ÜÇ DEVIRDEN HAKİKATLER (Facts On Three Eras About Which Celal Bayar Did Not and Will Not Write) 12 (1982) (emphasis in original). Bayar himself was a Responsible Secretary in Izmir (Smyrna), Aydın Province, and was 1950-1960 President of the Turkish Republic.

314. TAKVİMİ VEKAYI, No. 3586, June 28, 1919, at 164.

315. RENAISSANCE (Istanbul), Jan. 6, 1920.

*adiye*), the defendants would not be entitled to immunity under the act of state doctrine.

b. *The prosecution's exclusive reliance on domestic penal codes*

In seeking to punish the perpetrators of the Armenian genocide, the prosecution relied solely on the Ottoman Penal Code.<sup>316</sup> The Code, paralleling the French Penal Code's classification of offenses and corresponding criminal sanctions, had three major divisions. The first 47 articles defined the principles of culpability, delineating individual responsibilities and liabilities for violations. The second division, articles 48-167, defined general offenses directed against institutions, such as the government. The third division, articles 168-253, mainly prescribed the specific penalties. Of these, articles 168-191 dealt with acts of coercion and violence against persons.

The Court Martial classified the defendants as either principal co-perpetrators or accessories. For the first category, the Court invoked article 45, paragraph 1 of the Penal Code:

If several persons together commit a crime or if a crime is composed of several acts and each of a gang of persons perpetrates one or some of such acts with the object of the accomplishment of the offense, such persons are styled accomplices and all of them are punished as sole perpetrators.<sup>317</sup>

Further, the Procuror-General proposed to apply article 170 to the offenders of the first category. This article reads:

If a person's being a killer with premeditation is proved according to law[,] sentence for his being put to death is passed legally.<sup>318</sup>

Most importantly, the Procuror-General added the last paragraph of article 55 to cover the charge of "forcible alteration of the government" that was subsequently incorporated into the amended bill of charges. That paragraph reads:

The person whose forcible attempt to alter, change or destroy the Constitution, or the shape or form of the Government, or the system of succession of the Ottoman Empire is [to be] put to death.<sup>319</sup>

The Court designated the defendants in the second category, "accessories in the first degree" (*feren zimethal*), subjecting them to paragraph 2 of article 45, which read:

316. THE IMPERIAL OTTOMAN PENAL CODE (J. Bucknill & H. Utidjian trans. 1913). Article 13 of the original martial law provides for the application of civil penal codes whenever courts martial do not dispose over corresponding military codes. See 1 A. BILLIOTTI & A. SEDAD, *LÉGISLATION OTTOMAN DEPUIS LA RÉTABLISSMENT DE LA CONSTITUTION* 197 (1912).

317. THE IMPERIAL OTTOMAN PENAL CODE, *supra* note 316, at 32.

318. *Id.* at 125.

319. *Id.* at 47.

Those who are accessories in the commission of a crime become subject to punishment in the following manner where there is no explicitness in the law. . .the punishment of temporary forced labor for not less than ten years if the principal act calls for the punishment of death or perpetual forced labor. . .<sup>320</sup>

##### 5. *The Jurisdictional Challenge by the Defense: The Constitutional Argument*

Before accepting the post offered him on March 3, 1919, Damad Ferit, the new Grand Vezir, stipulated that he wanted, the defense's apparent stalling notwithstanding, a "[s]peedy judgment of the crisis so as to be able to deal with the authors of a crime that drew the revulsion of the entire humankind."<sup>321</sup> The procedures adopted to satisfy Ferit provided grounds for charges of constitutional violations. Defended by sixteen lawyers, the Ministers repeatedly challenged the competence of the Tribunal and criticized the procedures under which they were apprehended and prosecuted.

Led by Istanbul University Law Professor C. Arif (later Deputy, Parliament President and Minister of the Ankara government), the defense lawyers invoked several articles of the Constitution to support their challenge. The defense argued that article 31 of the Ottoman Constitution<sup>322</sup> set forth the procedures for bringing to trial a Minister charged with misconduct, specifying the High Court as the requisite venue for trial. The defense further claimed that the crimes charged in the indictment were not "ordinary crimes,"<sup>323</sup> but rather revolved around the implementation of the Law of Deportation which had been enacted by the government and sanctioned by an Imperial *Irade* (authorization). Since the massacres incident to the deportations were part of an act of state, guilt or innocence depended on the scope of ministerial duties and authority; as a result, they were not subject to article 33 but rather to article 92 which defined the function and composition of the High Court.<sup>324</sup> Indeed, the defense argued that even if one assumed that article 33 would apply, the article stipulated that in the event misconduct was not related to official acts, and a High Court is ruled out, existing criminal courts, not a court martial, must have jurisdiction.<sup>325</sup> Finally, the defense ar-

320. *Id.* at 32.

321. A. TÜRKGELDİ, GÖRÜP İŞİTTİKLERİM (The Things I Witnessed and Heard) 197 (1951). A month later the Grand Vezir went so far as to entertain the possibility of prosecuting, as a collective entity, all the "active" members of İttihad under the charge of having belonged to "a criminal organization." S. AKŞIN, *supra* note 258, at 201.

322. OTTOMAN CONST. (Midhat), 2 AM. J. INT'L L. 367 (supp. 1909).

323. TAKVİMİ VEKAYİ, No. 3540, at 10, 11.

324. *Id.* at 13.

325. *Id.* at 12.



gued that the Court did not have the authority to determine which article of the constitution should be applied in the case because article 117 specifies the Senate as the ultimate interpreter of the exact meaning of an article of the Constitution.<sup>326</sup>

The Court first rejected the act of state argument. Even if it granted that the massacres were incidental to the deportation, the Court noted that massacre was still murder, a separate and distinct state act. Only if new evidence established that the massacres were not intended but were merely inevitable results attending the fulfillment of official duties, would the Court consider the argument. The Court found, however, that the available evidence demonstrated that the massacres were part of policies and decisions arrived at by the defendants, not as Ministers conducting official work, but as members of a secret, conspiratorial association (*cemiyet*).<sup>327</sup> The Court also noted that the act of state defense was inconsistent with the indictment, which defined "the principal task" of the Court to be the investigation of "massacres and illegal, personal profiteering" (*taktil ve ihtikâr*).<sup>328</sup> Further, the bill of particulars singled out "the moral personality" of the Ittihad party of which they were the leaders, and asserted that in the course of exercising that leadership the defendants committed "personal crimes" (*şahsi ceraim*).<sup>329</sup>

The Court then rejected the remaining constitutional and jurisdictional challenges. Since martial law had been imposed by the Ittihad regime itself, and was still in force, neither articles 32 nor 33 could be invoked for the purpose of effecting a change of venue or for transferring the defendants to the jurisdiction of regular criminal courts, as motioned by the defense. Further, article 113, concerning the imposition of martial law, provided for the temporary suspension of civil rights. The Court again pointed to the language of the indictment: "wherever martial law is in force, civil and judicial laws are entirely muted" (*kavanini mülkiye ve adliye tamamı ile sakin*), and courts martial become the only penal recourse (*mercii ceraim*).<sup>330</sup> (Ittihad itself had further revised the original martial law in 1909 in order to have greater authority in suspending regular laws.<sup>331</sup>) The Court also rejected the defendants' claim that the Fifth Committee of the Chamber opted for the High Court. The Court noted that the Deputies had merely conducted an investigation without a

326. *Id.* at 11.

327. *Id.* at 14.

328. *Id.* at 8, 9.

329. *Id.* at 8, 14.

330. *Id.* at 8.

331. The Martial Law of Aug. 19/Sept. 1, 1910, article 1, reprinted in 1 A. BILIOTTI & A. SEDAD, *supra* note 316, at 483. Article 2 of the original martial law of October, 1877 specifically declares as "temporarily suspended" those provisions of the Constitution and other laws and administrative regulations that contravene martial law. *Id.* at 195.

final decision; since the Sultan had dissolved the Parliament, the impossibility of a Parliamentary vote invalidated the claim in question. Finally, consistent with the Court's holding, a special Imperial *Irade* with the force of a decree-law vested the Court with the requisite authority and competence to try the accused.<sup>332</sup>

## 6. *The Key Verdict*

Following a prolonged trial of the Cabinet Ministers, marked by a series of amendments of the Key Indictment in May and June, 1919, the Court entered its Key Verdict on July 5, 1919.<sup>333</sup> The Court found the Ministers guilty of both orchestrating the entry of Turkey into World War I and of committing the genocide of the Armenians. The Key Verdict traced Ittihad's wartime crimes to its 1908-1914 pre-war career. The Court cited the betrayal of the ideals of the Ittihad revolution which had overthrown the regime of Abdul Hamit in 1908, and the subsequent imposition of "arbitrary rule and tyranny to such a point that people began to yearn"<sup>334</sup> for the overthrown regime. It focused especially on Ittihad's violent reseizure of power in January, 1913, in the course of which War Minister Nazım and one of his Adjudants were killed.<sup>335</sup> By creating "a fourth instance of authority, above and beyond the three [branches of government] that comprise the legal framework of the Ottoman government, [Ittihad] resorted to coercive intimidation [*kuvvei tehdidiye*] in altering [*tagyir*] the machinery of the government . . . which amounts to altering the form of the government."<sup>336</sup> The Court also found that they

332. See TAKVİMİ VEKAYI, No. 3540, May 5, 1919, at 8; TAKVİMİ VEKAYI, No. 3543, May 8, 1919, at 17. In rejecting the defense arguments, the Court overlooked or ignored a major consideration. It is true that article 31 of the Ottoman Constitution sets the condition of a trial before the High Court for Ministers accused of misconduct—as opposed to a Court Martial. But it contains a contingency element—"if"—at the very beginning. It reads: "If one or more Deputies wish to level a complaint against a Minister whose responsibility is at issue on matters touching the domain of the Chamber. . ." (*şikayet beyan ettiği halde*). Thus, the Constitution neither compels nor precludes any particular line of procedure. Its provisions are binding only for Parliamentary procedures; other procedures, such as recourse to regular criminal courts, are not addressed. A Deputy may or can, but is not directed to take the High Court route. Consequently, the statute is not preemptory in its thrust; other options are available to Deputies or to judicial officials wanting to exercise criminal jurisdiction. Moreover, there is no record of any constitution with any provision affording an official, high or low, the privilege of being placed beyond the reach of public law for common offenses or crimes. This may be the chief, if not the only, reason why article 31 is prefaced with the preposition "if." The prosecution failed to make this point, even though in the Key Indictment it had declared emphatically that the crimes associated with the Armenian deportations did "constitute the real purpose of these court proceedings," TAKVİMİ VEKAYI, No. 3540, May 5, 1919, at 8, and as such were justiciable in courts other than the High Court.

333. TAKVİMİ VEKAYI, No. 3604, at 217-20.

334. *Id.* at 218.

335. *Id.* at 217.

336. *Id.* at 219.

“maintained almost without interruption the state of siege which necessarily was declared at the start of the revolution.”<sup>337</sup>

This domination of the state apparatus, the Court reasoned, was in line with “the special aspirations and objectives” of the party.<sup>338</sup> The engineering of Turkey’s entry into World War I through “aggression” was cited as a principal objective.<sup>339</sup> The Tribunal cited the testimony of Trabzon province’s delegate, who had been a key Special Organization leader, when it alluded to the incidence of “crime against peace.”<sup>340</sup> As this delegate testified, before the onset of the Russo-Turkish war in November 1914, Ittihad had organized guerilla forays into the Russian Caucasus in anticipation of the war it was set to provoke: “It was Ittihad’s predilection and intent that led to the declaration of war.”<sup>341</sup>

The second objective, “the organization and execution of crime of massacre [*taktil cinayeti*] by the leaders of Ittihad” against the Armenians, had been exposed during the preceding trials.<sup>342</sup> “This fact,” the Court noted, “has been proven and verified [*tahakkuk*] by the Court Martial.”<sup>343</sup> The Verdict focused attention on two subsidiary facts: (1) “The Armenians in particular suffered disaffection as the constitutional provisions guaranteeing security and justice proved ill-founded; as a result, they were prompted to assume a posture of waiting for an opportunity to fall back on their national aspirations.”<sup>344</sup> (2) “The Ittihadists deliberately exacerbated racial and national differences and cleavages,”<sup>345</sup> implicitly stigmatizing anyone against Ittihad as anti-Moslem. In this connection, the Verdict cited the Şeyhulislam’s testimony that “to resign from Ittihad meant to resign from Islām.”<sup>346</sup>

In the conviction and sentencing of the principal co-perpetrators, the Verdict relied on articles 45 (paragraph 1), 55, and 170 of the Penal Code as had been demanded by the Prosecution in the Key Indictment. Talat, Enver, Cemal and Dr. Nazım, the top leaders of Ittihad and Cabinet Ministers, were condemned to death in absentia. The lesser Ittihadists, also Cabinet Ministers, were convicted under article 45, paragraph 2. The Court imposed a sentence of fifteen years of imprisonment with hard

337. *Id.* at 218.

338. *Id.* at 219.

339. *Id.* at 218.

340. *Id.*

341. *Id.*

342. *Id.* This reference is to the Yozgat and Trabzon trials that preceded the trial of Ministers, *see infra* text accompanying note 347.

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.* at 219.

labor on the second category of offenders. The ex-Ministers of Post and Commerce were acquitted.

### 7. *Ancillary Verdicts and the End of the Proceedings*

The legal arguments and procedures applied to the trials of the Cabinet Ministers, especially the Key Indictment and the Key Verdict, set the tone for other trials that were occurring during this time. The common element in all the verdicts was the finding that the deportations were a cloak for the central plan of destruction of the deportees.<sup>347</sup> As the Yozgat Verdict declared, "there can be no doubt and no hesitation" about this fact. Furthermore, the real purpose behind the deportations had been proven by documents personally written and signed by the defendants (*hattı destiyle mukarrer vesika*).<sup>348</sup> That same Verdict, besides relying on specific Ottoman penal codes (articles 45 and 170 of the Penal Code and article 171 of the Military Code, concerning the offense of plunder of goods and provisions), invoked "the sublime precepts of Islam" as well as "humanity and civilization" to condemn "the crimes of massacre, pillage and plunder."<sup>349</sup>

The Yozgat judgment, like the subsequent Key verdict, deplored the Ittihadist defendants' agitation "not only among local Muslims, but among Muslims in general," in favor of murdering the Armenians, calling such agitation "a mortal sin."<sup>350</sup> The Yozgat Verdict likewise repudiated the defense's argument that the murders of innocent people were reprisals against Armenians elsewhere who had committed sabotage and other acts of rebellion.

These circumstances do not justify the commission of the crimes with which the defendants are charged. Besides, only a trifling portion of the Armenian people is implicated in these acts; the majority of them demonstrated their loyalty . . . . Such transfer of blame in any event is against the dictates of law and conscience.<sup>351</sup>

The Trabzon Verdict also invoked "the high principles of Islam and the provisions of the Ottoman Civil Code" to emphasize "the rights of all Ottoman elements to the protection of their honor, lives and properties, without discrimination, by the officials of the state, that protection being

347. Trabzon Verdict, TAKVİMİ VEKAYI, No. 3616, Aug. 6, 1919, at 1-3; Yozgat, TAKVİMİ VEKAYI, No. 3617, Aug. 7, 1919, at 1-2; Harput, TAKVİMİ VEKAYI, No. 3771, Feb. 9, 1919, at 1-2; Responsible Secretaries, TAKVİMİ VEKAYI, No. 3772, Feb. 10, 1919, at 1-6, Erzincan, TAKVİMİ VEKAYI, No. 3917, July 27, 1920, at 5-6. Portions of the Court Martial proceedings are embodied in TARIHİ MUHAKEME (Historical Trial) (K. Sudi ed. 1919).

348. TAKVİMİ VEKAYI, No. 3617, Aug. 7, 1919, at 2.

349. *Id.*

350. *Id.* at 1.

351. *Id.*

a matter of duty of the first order for the latter.”<sup>352</sup> The Armenian deportees, the Court found, were instead handed over to gangs of “repeat criminals” who methodically robbed, raped and murdered their charges, usually by drowning them in the Black Sea (*bahra ilka etmekle boğdurup mahv ettikleri*).<sup>353</sup>

The Responsible Secretaries Verdict found the defendants guilty of “the massacre and destruction of the Armenians and the plunder and looting of their goods and belongings. . . they had a free hand in their criminal activities [involving mainly] the organization and engagement [*tertip ve ihzar*] of the gangs of brigands assigned to massacre duty.”<sup>354</sup>

The actual sentences of those found guilty, however, provided a striking contrast to the concept of retributive justice which had motivated the prosecution. In the Harput trial, Dr. Şakir, the Political Director of the Special Organization, was convicted and sentenced to death in absentia. In all the ancillary verdicts only two relatively minor provincial officials and one gendarmery commander were executed for their complicity in the Armenian massacres.<sup>355</sup> In reference to light sentencing, Rear Admiral and British Acting High Commissioner at Istanbul, Richard Webb, stated “It is interesting to see . . . the manner in which the sentences have been apportioned among the absent and the present so as to effect a minimum of real bloodshed.”<sup>356</sup>

These trials were but a fragment of the many other trials for which only the preparations were completed as Kemalism emerged to displace the Sultan’s government. On January 13, 1921, the Courts Martial were abolished altogether, with jurisdiction reverting to regular military courts.<sup>357</sup> Nearly all of the key figures of Ittihad managed to escape Tur-

352. TAKVİMİ VEKAYI, No. 3616, Aug. 6, 1919, at 2.

353. *Id.*

354. TAKVİMİ VEKAYI, No. 3772, Feb. 10, 1919, at 3.

355. Those executed were: (1) Mehmed Kemal, county executive (*kaymakam*) of Boğazlıyan, and during the massacres, Deputy District Commissioner (*mutasarrıf*) of Yozgat. TAKVİMİ VEKAYI, No. 3520.

(2) Abdullah Avni, nicknamed Hayran Baba, who was in charge of the Erzincan gendarmery. He was the brother of Abdul Gani, a prominent Ittihadist and the Responsible Secretary of Edirne. TAKVİMİ VEKAYI, No. 3917, July 27, 1920, at 5-6.

(3) Behramzade Nusret, Bayburt county executive, later District Commissioner of Ergani, and subsequently of Urfa. TAKVİMİ VEKAYI No. 3924. After the debacle of the Damad Ferit regime and the ascendancy of Kemalism, the military Appeals Court overturned Nusret’s July 20, 1920 verdict on January 7, 1921. See G. JÄSCHKE, *supra* note 157, at 95. Both Kemal and Nusret were then declared “national Martyrs” (*milli şehid*). Jäeschke, *Beiträge zur Geschichte des Kampfes der Türkei um ihre Unabhängigkeit*, 5 N.S. DIE WELT DES ISLAMs 16, n.6 (1958). On December 25, 1920, the Ankara regime allocated a pension for Nusret’s family. See G. JÄSCHKE, *supra* note 157, at 95.

356. FO 371/4174/118392, folio 267 (July 7, 1919 communication).

357. The abolition was part of a series of related political acts: (1) On April 29, 1920, a bill was introduced in the new Kemalist National Assembly in Ankara to declare the official deci-

key before being brought to trial.<sup>358</sup> Scores of other, lesser Ittihadists were likewise condemned to death in absentia or sentenced to prison terms. Many of these eventually escaped or were set free. The July 24, 1923 Treaty of Lausanne<sup>359</sup> which preempted and replaced that of Sèvres, was framed in such a way so as to avoid treating the subject of war crimes and massacres. With Declaration VIII of Amnesty and the Protocol attached to this treaty,<sup>360</sup> and as Kemalism gained the upper hand and eventually ended the Ottoman Empire, the pursuit of justice for the Armenians within international law was abandoned.

sions and decrees of the Sultan's Istanbul government null and void. (2) On June 7, 1920, the Ankara government enacted Law No. 7, which declared the Istanbul government, its Treaties and Agreements, invalid as of March 16, 1920, when the Allies formally occupied the city and assumed full control of it. (3) On January 3, 1921, the Kemalist Ankara Government decided to have its Independence Court supplant the Court Martial in the judgement of the crimes alleged to have occurred in Yozgat (Ankara province). (4) On April 25, 1922, the last Cabinet of the last Grand Vezir was impelled by the Kemalists to declare military Tribunals incompetent to try "nationalists," meaning adherents of Kemalism. (5) On November 6, 1922, Ankara laws were introduced in Istanbul and proclaimed to be the new laws of the land. (6) Finally, on March 31, 1923, general amnesty was announced for all those convicted by Courts Martial as well as civilian courts. G. JAESCHKE, *supra* note 157. All six acts are described at 76, 80, 95, 128, 142, and 148 respectively.

358. Most of these war criminals, however, were tracked down and executed by Armenian "avengers." These executions occurred in Germany and Russia, where all of the condemned men cited in the text had fled. Talat was assassinated in Berlin on March 15, 1921. Dr. Şakir assassinated in Berlin on April 17, 1922. Cemal was gunned down in Tbilissi (Tiflis) on July 21, 1922. Enver is said to have been tracked down by Agabekof, an Armenian operative of the Communist Secret Service, in the Emirate of Bukhara, and killed on August 4, 1922 during the ensuing fight. Though the literature on Enver's end is imprecise, the following sources are instructive: ESAD BEY, *DIE VERSCHWÖRUNG GEGEN DIE WELT* (1932); *Wie der Klassenkampf im Emirats Buchara entschieden wurde*, FRANKFURTER ALLGEMEINE ZEITUNG (Frankfurt), Feb. 6, 1980, at 9; SOVETAGAN HAYASDAN (Yerevan, monthly publication), Aug. 1984, at 8.

Ten days after the execution of Şakir, Dr. Nazım, who had also taken refuge to Berlin, fled back to Turkey to escape a similar fate after accepting the Kemalist condition that he as well as other Ittihadists would be welcome to the fatherland if they would integrate themselves into the new regime. But Nazım was charged with conspiracy in connection with the Ittihadist attempt on the life of Mustafa Kemal and was hanged in Ankara on August 26, 1926, by the order of the Independence Court. FO 371/11528/E5141. Only one of the commandos of these carefully planned and accomplished series of executions was apprehended, but the German Criminal Court acquitted the self-confessed culprit who had tracked down and assassinated ex-Grand Vezir Talat in Berlin. Commenting on this event, Robert Kempner, U.S. Deputy Chief of Counsel, Nuremberg War Crimes Trials, stated that the incidence "focused global attention on a particularly important development in international law." From the foreword of a soon-to-be published book on this trial (on file with author). For details on the assassination and trial see Dadrian, *supra* note 169, at 359, n.113.

359. Treaty of Lausanne, 28 L.N.T.S. 12, 117 Brit. and For. St. Papers 543, *reprinted in* 18 AM. J. INT'L L. 1 (Supp. 1924).

360. *Id.*; Declaration of Amnesty is in article 1. In commenting on the failure of the feeble Allied efforts to secure a measure of justice for the Armenians at Lausanne, an author wrote: "it became a matter of the highest importance from the humanitarian standpoint that liberal provisions be made regarding the treatment of the Armenians. . . as determined by the Treaty of Peace." Turlington, *The Settlement of Lausanne*, 18 AM. J. INT'L L. 699-700 (1924).

8. *Political Impediments to the Domestic Trials*

The promise of domestic retribution went unrealized for the same reasons that the international efforts had failed. The demands of national sovereignty on the part of Turkey overwhelmed the weak commitment of the European Powers to punish the Turks' crimes against humanity in the genocidal killing of the Armenians. The force of the national sovereignty argument is especially strong in cases where the criminal act was committed by Turkish subjects upon Turkish subjects and within the territorial boundaries of Turkey. Furthermore, a nation will generally be unwilling to assume the collective guilt that domestic punishment of its former leaders implies. In this setting, the political infighting, both within Turkey and between the Allied Powers, often played a larger role in the criminal trials than the demands of justice.

a. *The preliminary stages of the trials*

From the very first stages of the criminal prosecution in Turkey, the proceedings were subject to the pressures of internal Turkish politics. The enemies of the discredited Ittihad party, comprising journalists, intellectuals, civil servants, and retired military officers, were in the forefront of the campaign aimed at punishing the leaders of that party. Himself a foe of Ittihad, the Sultan encouraged that effort. Further, for most of the critical period of the trial (March 4, 1919-October 17, 1920), Damad Ferit, himself an avowed foe of Ittihad, occupied the office of Grand Vezir. In fact, the desire for retribution was at first so strong that in the first few months after the Armistice, prosecution threatened to give way to persecution. The headquarters of the Ittihad party as well as several branches were raided, the inventories impounded, and the properties of the fugitive leaders confiscated.<sup>361</sup> Further, at one point "ten political dignitaries" appealed to the Sultan to punish the Ittihadists by recourse to speedy justice.<sup>362</sup>

These efforts, however, were more than offset by the residual authority and influence of Ittihad, whose partisans and sympathizers still dominated the Civil Service, the War Office, and especially the police.<sup>363</sup> After temporarily receding into the background, Ittihad began to form a

361. M. GÖKBILGİN, *supra* note 270, at 8-10; TAKVİMİ VEKAYI, No. 3462. The respective official documents on these acts of confiscation are reprinted in 2 T. TUNAYA, *supra* note 144, at 55-59.

362. S. AKŞIN, *supra* note 258, at 151. The message was relayed on January 23, 1919.

363. A *London Times* correspondent stated that the organizational network of the Ittihad in Turkey was "almost intact." *TIMES* (London), Jan. 1, 1919. American High Commissioner Heck confirms this observation in his report to the U.S. Ambassador in Paris, complaining that "the great majority of officials [are] still members of the C.U.P. [Ittihad] organization." FO 608/342/8514 (Curzon memorandum, enclosure no. 2, Apr. 18, 1919).

network of resistance cells in many wards of the Ottoman capital. Many key officials in the Interior and Justice Ministries, co-opted by Ittihad, began to obstruct the pace and direction of the trials. These officials withheld crucial documents, impeded communication with provincial authorities, delayed compliance with court orders for production and certification of secret and top secret cipher telegrams, and altogether encumbered the proceedings. In addition, they helped a host of key suspects escape.<sup>364</sup>

While the suspects awaited trial in the military prison, the British military authorities in charge of implementing Armistice terms issued a report that noted:

All prisoners of whom there are 112 are allowed to walk about the prison and mix freely during the day. Except for a casual glance at their passes, individuals are not subjected to any inspection on entering the prison, and large packets are often to be seen being carried in by individuals, stated to be food, but might be anything. Women are allowed in all times during the day, and are never inspected.<sup>365</sup>

The privileges enjoyed by these suspects extended to the conditions of their detention. They were not subject to the close confinement and stern control ordinarily imposed upon suspects awaiting criminal proceedings. In his memoirs, one inmate relates how the Cabinet ministers were able to gather together in a large room for what the inmate sardonically labelled the prison's "Cabinet Council" sessions to discuss defense strategy. The ministers even invited Osman, the Legal Counsellor of the Interior Ministry, for consultation.<sup>366</sup>

#### b. *The trials*

Despite their good intentions, the Turkish tribunals lacked the strength for the full prosecution of those charged with carrying out the Armenian genocide. This weakness reflected the relative impotence of the post-war government. No government called upon to represent the interests of a vanquished nation can be strong; rather, it can function at best as a shock-absorber. By assigning blame and fixing punishment, the

364. The escapees included three top Party leaders heavily implicated in Armenian massacres: Trabzon's Responsible Secretary Nail, Erzurum's Delegate Hilmi, and that region's Chief of the Special Organization, Cafer; they obtained documents (*vesika*) from the government to flee by ship. Masterminded by the residual leadership of the Special Organization, these ventures also involved escapes from War Ministry's Bekirağa prison by other prominent perpetrators. Among these were Sixth Army Commander Halil, Ittihad Central Committee member Küçük Talat, and former Diyarbakir province governor Dr. Reşid. H. ERTÜRK, *İKİ DEVRİN PERDE ARKASI* (Behind the Scenes During Two Eras) 213, 326-27 (S. Tansu ed. 1957).

365. FO 371/4174 (folio 149), June 28, 1919.

366. A. YALMAN, *supra* note 180, at 339-41.



Turkish Courts Martial were expected to alleviate the devastating domestic consequences of military defeat through "catharsis," and, at the same time, mollify the victors. They were, therefore, placed in a position which, by its very nature, tended to weaken the judicial will to adjudicate the criminal charges.<sup>367</sup>

Generally, no nation can adjudge impartially and condemn itself, directly or indirectly, on charges of complicity in atrocities unless it is strictly constrained to adhere to the law and the facts of the case.<sup>368</sup> This tendency often emerged in the course of the trials in the Turkish Courts Martial. For example, following the relatively mild Yozgat Verdict of the Turkish Military Tribunal, in which one minor official received a death sentence, the Secretary-General of the defunct Ittihad party indignantly labelled the Verdict a "self-condemnation by the Government and the Court, and a condemnation of the Turkish nation."<sup>369</sup> A Prime Min-

367. Adaptive justice can exert itself in the opposite direction as well. A very strong government with dictatorial powers can cause judicial sternness to transform prosecution into persecution. Wartime governments inherently possess such unlimited or near-unlimited powers. As weak as the post-war Turkish Courts Martial were, their wartime counterparts, fully propped up by the dictatorial Ittihadist regime, mustered sufficient strength to stage show trials in order to execute countless numbers of Armenians on charges of treason without regard to the elementary rules of due process and the law of evidence (most victims, of course, were simply executed).

368. On May 20, 1919, the British Foreign Office counselor referred in his minutes to "the incompetence of the Turkish tribunals," and to "the Gilbertian methods of the Turkish judiciary." FO 371/4173/76582, folio 380. On May 21, 1919 the British Foreign Office in a cable marked "urgent" apprised Foreign Minister Balfour in Paris that the Turkish Court Martial proceedings required "embarrassing supplementaries as to ability of Turkish authorities to ensure satisfactory results. . ." FO 371/4173/77213, folio 388. On July 10, 1919, Tilley, the Acting Undersecretary stated in a report to the Law Officers of the Crown that "the great majority [of the suspects] are either under remand or have been released on bail, or have been acquitted or escaped." FO 371/4174/129560, folio 430/2. On August 1, 1919, the British High Commission at Istanbul in a historical review of the status of Turkey informed London that "trial by the Turkish Court Martial was proving to be a farce and injurious to our own prestige and to that of the Turkish government." FO 371/4174/118377, folio 256. On September 21, 1919, British High Commissioner Robeck told Foreign Minister Curzon that the Court Martial proceedings are "in many respects unsatisfactory and chaotic; . . . such a dead failure that its findings cannot be held of any account at all, if it is intended to make responsibility for deportations and massacres of inter-Allied concern. . . it is generally thought now that little can be expected from Court Martial. . ." FO 371/4174/136069, folios 466, 469-70. On November 17, 1919, Vice Admiral de Robeck reiterated to Curzon that "the Turkish Court Martial. . . was never efficient and whose President and members are continually being changed, has become more of a farce than ever." FO 371/4174/158721, folio 524. This outcome was anticipated by the U.S. High Commissioner in the Ottoman capital, Lewis Heck, at the very start of the Courts Martial when on February 7, 1919, he sent a telegram stating, "proceedings conducted characteristically dilatory fashion and attitude of court . . . showing little disposition to be severe or rapid in judgement." R.G. 256, 867.00/81.

369. See *supra* note 217, at 62.

ister of the Ankara government described the Verdict as "a concession and certification of guilt by our own government"<sup>370</sup>

The abortiveness of the Istanbul trials also reflected the Turks' increasingly defiant attitude toward the Allies. The sources of this defiance were due only in part to nationalism. To a much greater degree, they can be traced to the irresoluteness of the victorious Allies. The Allies' failure to completely occupy Turkey left the state system intact, thus implicitly recognizing Turkish sovereign rights. Further, the treaty terms providing for the surrender and trial of war criminals before Allied tribunals caused unnecessary delays, allowing suspects to disappear, witnesses to disperse, incriminating evidence to be removed or rendered inaccessible, and the immediate post-war public shock and revulsion regarding the atrocities to dissipate. The Allied Powers also neglected to insert criminal sanctions into the Armistice Conventions, incorporating them instead into the terms of the Versailles and Sèvres Treaties. At times, the Powers seemed almost willfully to abandon their power over post-war Turkey. For example, the British returned "over 100,000 prisoners of war . . . to Anatolia without any condition whatever despite the fact that a state of war still exists."<sup>371</sup>

The disagreements, feuds and rivalries among the Allies further emboldened the Turks to flout the terms of Armistice. Within six months after the Armistice, the British, French, and Italians began to work at cross-purposes, often undermining each other's efforts. The French and the Italians began to support, at first secretly and then openly, the rival Kemalist government in Ankara, thereby hastening the demise of the Istanbul government and its Sultan. These diplomatic efforts crippled the retributive justice process. The British Attorney-General advising the Foreign Office in London, and indirectly the British High Commission at Istanbul, of the effects of these efforts, stated: "There is the improbability that the French and the Italian Governments would agree to participate in constituting the court provided for in article 230 of the Treaty of Sèvres."<sup>372</sup> The British were thus left in the lurch.

The signing of the Lausanne Peace Treaty was the Allies' final act of acquiescence to Turkey's new national policy. The principle of retribu-

370. See F. OKYAR, *ÜÇ DEVİRDE BİR ADAM* (A Man of Three Eras) 280 (1980). This point is one that has no German parallel; as the Leipzig trials did not result in any death sentences, there was no cause for a similar reaction in Germany.

371. FO 371/6509, folio 130 (British General Harrington's cipher No. 982 to the War Office, Sept. 14, 1921). Addressing the same issue, British High Commissioner Thomas Hohler wrote to London, "I never contemplated that the Allies would reduce their military forces so thoroughly before they had made peace and imposed their conditions. We have acted on the reverse principle of the Japanese, whose old proverb is that the end of the fight is the right time to tie on your helmet." P. HELMREICH, *FROM PARIS TO SÈVRES* 236 (1974).

372. FO 371/6509, folio 29, No. 851.

tive justice, solemnly heralded during World War I, and reiterated after the end of hostilities, was lost in the aftermath of the war.

### c. *The parallels with the German Leipzig trials*

The history of the 1921-1922 Leipzig trials was remarkably similar to that of the 1919-1921 Istanbul trials. In both cases, the domestic governments were reluctant to accede to foreign pressure and institute criminal proceedings against their own nationals for wartime crimes against humanity. Both nations, however, finally agreed to prosecute the cases. The Germans did so as a way of placating public opinion in the Allied countries, while the Turks did so in expectation of being rewarded by lenient peace terms.

By refusing to surrender German nationals to the Allies for trial, the German government virtually repudiated article 228 of the Versailles Treaty, which stipulated such a surrender. Field Marshal von der Goltz's scornful declaration, "The world must realize that . . . no catch-poll shall hand Germans over to the Allies,"<sup>373</sup> was symptomatic of the powerful resistance among Germans to which the Allies eventually succumbed. The Turkish response to the demand for the surrender of criminal suspects paralleled the German response. Not only did the Foreign Minister of the Istanbul government object to surrendering Turkish nationals to the Allies, but Mustafa Kemal, the head of the antagonistic Ankara government, rejected the very idea of "recognizing a kind of right of jurisdiction on the part of a foreign government over the acts of a Turkish subject in the interior of Turkey herself."<sup>374</sup>

Instead, both "vanquished states" offered internal proceedings against the war criminals. On June 11, 1921, the Ankara government informed the British that when the Malta internees were released in exchange for British civilian and military persons, "those accused of crimes would be put on impartial trial at Ankara in the same way as German prisoners were being tried in Germany."<sup>375</sup> This, as well as subsequent similar assurances, proved to be mere negotiating ploys. Beyond nationalist politics, a legal issue worked in Turkey's and Germany's favor: the *ex post facto* character of the provisions of both the Versailles and Sèvres treaties in that they were not predicated on existing national or international

373. WAR CRIMES COMMISSION, *supra* note 113, at 48.

374. Speech delivered by Mustafa Kemal in Ataturk in 1927, 497 (Istanbul, 1963) [hereinafter Speech].

375. FO 371/6509, folio 47. Three months later the Interior Minister of the Ankara government repeated the same pledge when he informed General Harrington, then the highest military authority at Istanbul, that those Malta exiles implicated in war crimes "will be tried on arrival." FO 371/6509/E10411, folio 130. A similar assurance was given by Ankara's Foreign Minister Bekir Sami. FO 371/6499/E3110, at 190; see also A. YALMAN, *supra* note 251, at 106.

laws. Article 15 of the Ottoman Penal Code, for example, explicitly prohibited that type of procedure ("punishment is not to be effected in accordance with a subsequent law"). Neither the Versailles nor the Sèvres treaties specified the jurisdiction and laws by which conviction and sentence rendition could be effected.

Attempts at extradition raised comparable difficulties. The Dutch government refused to surrender Kaiser Wilhelm II who had taken refuge in Holland after fleeing Germany at the end of the war. The Dutch rejected not only the concepts of "international policy" and "international morality" upon which the Allies proposed to try and punish the Kaiser, but they also invoked the domestic laws and national traditions of Holland as further justification. The Dutch defined the offense with which the Kaiser was charged as "political" and hence exempt from extradition.<sup>376</sup>

Similarly, Germany refused to surrender Talat Paşa, who as Grand Vezir was the de facto head of the Ottoman state when he fled to Germany at the end of the war. German Foreign Minister Solf invoked paragraph 2 of article 5 of the 1917 Turko-German Extradition Treaty which permitted extradition under three conditions: an arrest order, a verdict against the person whose extradition is being sought, or the submission of related judicial documents. As the Court Martial had not yet taken place, there was no judicial documentation of a verdict. At any rate, added Solf, "Talat stuck with us faithfully, and our country remains open to him."<sup>377</sup>

As the trials progressed, internal pressures in both countries, caused by resurgent nationalism, strongly affected the proceedings. From similar beginnings, the Leipzig trials resulted in similar failures as their counterparts in Istanbul. "The German public showed indignation that German judges could be found to sentence the war criminals and the press brought all possible pressure to bear on the Court."<sup>378</sup> Many of the defendants were cheered upon entering or leaving the courtroom, while representatives of the Allies attending the trials were hooted. Those acquitted often departed the courtroom with bouquets of flowers offered to them by an admiring public. Prison guards who assisted in the escape of some defendants before or after conviction were publicly congratulated.<sup>379</sup> The most famous case involved the Llandoverly Castle Hospital

376. See Wright, *The Legal Liability of the Kaiser*, 13 AM. POL. SCI. REV. 120 (1919); N.Y. TIMES, Jan. 22, 1920.

377. A.A. TÜRKİ 183/54 A45718. For the protracted exchange on this subject between the German Foreign Office and the Ottoman Foreign Ministry, see FO 371/4173/82190, 371/4174/98910, 371/5173/E6949, 618/113/1941, folios 404-15; see also 3:4 Y. BAYUR, *supra* note 124, at 782.

378. WAR CRIMES COMMISSION, *supra* note 113, at 51-52.

379. See J. WILLIS, *supra* note 12, at 126-47.

## The Armenian Genocide

Ship, which had been torpedoed and sunk, with two naval lieutenants firing upon the survivors in the lifeboats. The two lieutenants proudly accepted the *London Times* calling them “barbarians,” while the German press hailed them as “U-Boat Heroes” upon their being sentenced to four years’ imprisonment.<sup>380</sup>

The outcome of the Leipzig proceedings was dismal by any standard of retributive justice. Out of a total of 901 cases,<sup>381</sup> 888 suspects were either acquitted or summarily dismissed. Only twelve trials were held; half resulted in acquittals and half in convictions with light sentences. Allied disappointment at the popular exaltation of the defendants and subversion of justice in Turkey, also applied to Germany. In the latter case the Allies appointed a Commission of Allied jurists to examine the effect of the popular response on the proceedings. The Commission unanimously recommended to the Supreme Council that the Leipzig trials be suspended and the remaining defendants be tried before Allied Courts. As in Turkey, the Commission’s recommendations failed to yield the desired results.<sup>382</sup>

### Summary

Although occurring more than seventy years ago, the Armenian genocide provides important insight into the roles of international actors in preventing or punishing genocide and the challenges that the international legal system faces in each case. Its prescriptions, however, are mostly negative. The Great Powers of Europe, through a misreading of the Turkish domestic situation and a hesitant, fumbling policy of “humanitarian intervention,” not only failed to prevent the genocide but exacerbated it by encouraging the Armenians to press for reforms and then failing to protect them from Turkish backlash. The unsuccessful attempts at punishment following the war suggest two additional general principles. First, the domestic courts of a vanquished adversary cannot effectively be used to punish citizens of that country for war crimes, especially crimes committed with the tacit support of the populace. Second, genocide by a conquered power can only be effectively prosecuted if the victors remain united in firm resolve. Pursuit of individual political gain by the victors is incompatible with the demands of justice.

380. *TIMES* (London), July 9, 1921; *German War Trials: Report of the Proceedings before the Supreme Court in Leipzig*, 16 AM. J. INT’L L. 628-40, 674-724 (1922); see also C. MUL-LINS, *THE LEIPZIG TRIALS* (1921); 2 ANN. DIG. 436 (Reichsgericht 1921).

381. The lists of these suspects were, in part, compiled and transmitted to the Germans by Britain (97), Belgium (334), Poland (57), France (332), Italy (29) and Rumania (41). The remaining suspects were fugitives.

382. *GERMAN WAR CRIMES: REPORT OF THE PROCEEDINGS*, BRIT. PARL. PAPERS, Cmnd. 1450 (1921).

The Armenian Genocide was a direct consequence of the social-political system that existed in Ottoman Turkey during the years leading up to World War I. Because of certain intractable components, most notably religious beliefs which could not be reconciled with conceptions of Armenian equality, the Ottoman system was subjected to unabating external and internal pressures. The specific challenge to scholarship here is to discern the connection between these pressures and the unique and tragic nature of the response they triggered in this case. It is the basic thesis of this study that the genocidal nature of the Turkish response was in part conditioned by Ottoman traditions and theocracy. The norms and the associated corpus of the Ottoman customary and common law for subject nationalities and minorities not only allowed, but in many instances encouraged, such a drastic response as a form of crisis management. Thus, what was considered deviant by external, international standards was considered normal and functional by domestic Ottoman desiderata.

The concept of "status" provides the link between the social and legal criteria in the study of the Armenian genocide. The Armenians were not only an ethnic-religious minority with social disabilities, but also a politically disenfranchised group, denied legal equality. Their inferior status made them permanently vulnerable. The permeation of Islamic dogma and tradition into the Ottoman social system, reinforced by the martial traditions of the Empire, reinforced Armenian vulnerability. Most important, the Ottoman legal system became permeated with the elements of the Islamic canonic law, the *Şariat*, which required this unequal status as a fundamental and fixed truth under Islam.

The nineteenth-century "humanitarian interventions" of the Concert of Europe to protect the Armenians failed in large part because they did not give due consideration to the socio-political forces which forced the Armenians into an inferior position. By failing to address this central factor, the Europeans allowed the Ottoman state to pursue the more expedient but far less effective route of responding to the symptoms the socio-political system produced. A series of treaties and agreements signed between the European Powers and Turkey between 1856 and 1914 nominally obligated the Ottoman authorities to extend equality to their non-Muslim subjects. The Turkish authorities, while feigning concurrence with the need for reforms, ensured that these reforms never took actual effect. By pursuing a strategy of stalling and temporizing,<sup>383</sup> while

383. A Belgian legist described the distinguishing characteristics of modern Ottoman diplomacy—great facility in assimilating the administrative and constitutional jargon of civilized countries; consummate

at the same time playing the Powers against each other, the Turks managed to defuse internationally explosive situations without taking any action contrary to their religious beliefs. At issue for the Turks was not the formal introduction of reforms, a series of which were in fact enacted and promulgated, but their effective implementation. The Armenians were not "entitled" to, and hence were not going to be accorded, equality in the Ottoman system. When deception and deferral were ineffective, the Turks resorted to violent measures of repression, culminating first in the 1894-1897 Hamidian massacres. These massacres are important not only because they foreshadowed the subsequent genocide, but also because the perpetrators were not prosecuted. Given this precedent, the Turks had strong reason to believe that there would likewise be no punishment for subsequent killings.

The intransigence of the Ottoman government, which gathered momentum through the diplomatic crises and associated Armenian pogroms, found a violent outlet in the pursuit of World War I, into which Turkey willingly plunged by unilaterally provoking and initiating hostilities.<sup>384</sup> The Ottoman government saw the war as a way to end once and for all the grounds for foreign intervention. The peremptory wartime annulment of the treaties of Paris and Berlin and the 1914 Agreement, depriving the Armenians of their last vestiges of hope, attested to this intent.

These acts of annulment may technically be attributed to the effect of war; international law has no explicit or uniform rules for the preservation or annulment of treaties during war.<sup>385</sup> The annulments acquire critical significance, however, when placed in the context of Ottoman Turkey's continuous flouting of treaty provisions in the decades preceding the war. The episodic pre-war massacres of Armenians occurred

cunning in taking advantage of this cunning to conceal, under deceptive appearances, the barbarous reality of deeds and intentions; cool audacity, making promises which there is neither the power nor the desire to make good and finally, a paternal and oily tone, intended to create the impression that the Turkish Government is the victim of unjust prejudices and odious calumnies.

M. ROLIN-JAEQUEMEYNS, *supra* note 35, at 87. The international law expertise of the author of this statement lends it special significance. He was the editor of *Revue de droit international et de législation comparée*, and twice the President of the Institute of International Law. In 1899 he took part in the First Peace Conference of the Hague and was appointed Reporter for the Fourth Convention on the Laws and Customs of War. At the end of World War I, he went to the Peace Conference at Paris as the Secretary-General of the Belgian delegation, was later appointed Belgian High Commissioner in the Occupied Territory of the Rhineland, and subsequently became Belgian Minister of Internal Affairs. In 1930 he reached the pinnacle of his career when he was elected to be a judge of the Permanent Court of International Justice. 18 BRIT. Y.B. INT'L L. 156-57 (1937) (obituary).

384. See *supra* note 126.

385. 2 L. OPPENHEIM, INTERNATIONAL LAW § 99 (7th ed. 1952).

when these treaties were in force but not enforced. The European Powers elected to substitute expressions of outrage for any implementation of sanctions. While it must also be pointed out that the relevant treaties lacked self-executing provisions in case of violation, the fact remains that the Powers' inaction was not due to any sensitivity to legal niceties but rather to mutual suspicions and rivalries.<sup>386</sup> The climax of this European ritual of alternately remonstrating with and threatening Turkey came in May, 1915 with the initiation of the Armenian genocide. The genocide was consummated irrespective of Europe's threats, and the perpetrators once more escaped punishment.<sup>387</sup>

The historical perspective employed in this study demonstrates the fact that the episodic Armenian massacres served both as a crucible and a prelude to the World War I holocaust. Had the Powers interceded in concert after any one of these episodes, as they did in Lebanon in the aftermath of the 1860 massacre, the issues of prevention and punishment in all likelihood would not have arisen.<sup>388</sup> They were impeded, however, by the vagaries of politics, among themselves and in relation to the Turkish state. While they pretended to pursue "humanitarian intervention," they actually engaged in *Realpolitik*; the Turks understood the resulting

386. In the Nuremberg Judgment the Court specifically stated that "in many cases treaties do no more than express and define for more accurate reference the principles of law already existing." Bassiouni, *supra* note 113, at 285.

387. The viability of recourse to humanitarian intervention in contemporary settings of domestic conflict and mass murder is discussed by a number of experts of international law. Falk, for example, enumerates the obstacles to effective intervention in the face of genocidal killings, underscoring his assertion that unless the world order becomes amenable to structural changes providing new standards of international law, the obstacles are likely to persist. Falk, *Responding to Severe Violations*, in ENHANCING GLOBAL HUMAN RIGHTS (1979). After surveying the history of humanitarian intervention and the present state of the law respecting the resort to coercive force on humanitarian grounds, two legal scholars conclude that such intervention, especially when unilateral, is not sanctioned historically or by current standards, except with the sanction of the United Nations. They, therefore, dispute the merits of arguments defining as precedent-setting India's use of military force against Pakistan and in favor of Bangladesh. Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 302 (1973).

The example these authors set in incorporating the Armenian case of genocide into their arguments was followed by two others who, in their most recent contributions to the field of international law, depict the "full-scale extermination of . . . approximately one million Armenians . . . in Turkey," Bazyler, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 593 (1987), and emphasize the fact that "the [U.N.] Convention [on the Prevention and Punishment of Genocide] would cover the Armenian Genocide." LeBlanc, *The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?*, 13 YALE J. INT'L L. 270, 290, 293 (1988).

388. After his conviction at Nuremberg, Albert Speer, reflecting on the crime of deportations, deplored the failure of the Allies to prosecute the violators. Such prosecution "would have encouraged a sense of responsibility on the part of leading political figures if after the First World War the Allies had actually held the trials they had threatened . . ." J. WILLIS, *supra* note 12, at 173.



cleavage between purport and intent and took it into account when considering radical preemptive measures. This aspect of the conduct of the Powers introduced a third element into the picture, one which was counterpoised to prevention and punishment but which distorted them both: the inadvertent aggravation of a domestic conflict by perfunctory interventions whose latent functions produced disaster instead of relief.

The humanitarian interventions by the European Powers awakened the national consciousness of the Armenian population in Ottoman Turkey. Once awakened, however, it was given no outlet. The Armenians looked to the treaties and agreements signed by the Ottoman Empire and began to demand that their paper rights be recognized in practice. The problem, however, was that these treaties were not legislative enactments but merely contracts between states; thus they did not specify a crime, assign jurisdiction, or provide the machinery for the administration of punitive justice. These limitations, still intrinsic to the field of international law, spelled disaster for the Armenians. Rather than resulting in a resolution of the Armenian Question, these treaties served only to internationalize the issue.<sup>389</sup>

A domestic conflict for the Ottomans was thus transformed into an international headache. Fridjof Nansen, who as High Commissioner of the League of Nations tried very hard to succor the wounds of Armenia and rehabilitate the survivors of the holocaust along with the other refugees of the war, for which he was awarded the Nobel Peace Prize in 1922, ended his volume on the Armenian tragedy with this lamentation: "Woe to the Armenians, that they were ever drawn into European politics! It would have been better for them if the name of Armenia had never been uttered by any European diplomatist."<sup>390</sup>

389. In his closing speech at the Cabinet Ministers' trial, the Turkish Procuror-General Reşad specifically cited the Berlin Treaty as the principal source of the rise and development of the Turko-Armenian conflict. L'ENTENTE (Istanbul), June 26, 1919. It was article 61 of that Treaty that stipulated reforms for the Armenians, "and thereafter the 'Armenian question' [was] internationalized." Ahmad, *Unionist Relations with the Greek, Armenian and Jewish Communities of the Ottoman Empire, 1908-1914*, in *I CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE* 404, 423 (1982).

Commenting on this issue in 1920, Brown deplored "the intrusive and fruitless friendship of Great Britain for the Armenians" as being responsible for the 1895-96 and World War I massacres. Brown, *The Mandate Over Armenia*, 14 AM. J. INT'L L. 396, 397-98 (1920). Secretary of State (later Chief Justice) Charles Evans Hughes, in a 1924 address to the Council of Foreign Relations, likewise attributed "a large part of the distress" at issue here to the "encouraging action [of the British] which failed of adequate support. . . . [The victims were] left to their own devices." Hughes, *Recent Questions and Negotiations*, 18 AM. J. INT'L L. 229, 239 (1924).

390. F. NANSEN, *ARMENIA AND THE NEAR EAST* 324 (1976). During his engagement as League of Nations' High Commissioner for Relief for Russia, Nansen tried to seek justice and redemption for Armenia, whose fate he defined as "the betrayal of a nation." His exchange with Lord Robert Cecil, then Assistant Foreign Minister of Great Britain, epitomizes his dis-

The Armenian experience is also instructive in that the failure to prevent a particular instance of genocide does not ensure its subsequent punishment. Although Nuremberg provides a striking counterexample of international consensus, the Armenian experience of noble talk without substantive action is, sadly, far more common. The international efforts at retribution following World War I, both in the case of Turkey and its ally Germany, reveal the weakness of international punishment as an effective deterrent to future acts of genocide. The international efforts of the European Powers to bring the perpetrators of the Armenian genocide to justice fell victim to the overarching principle of national sovereignty and the machinations of international politics. By allowing the Ottoman government to remain in place following its defeat in the war, the European Powers gave up the authority that they needed to effectuate retribution for the massacre. The presence of a sovereign government in Turkey not only impeded the initiation of international trials through legal barriers, such as issues of jurisdiction, and practical impediments, such as difficulties in securing the evidence needed for international prosecution, but led to the splintering of European resolve by fostering political maneuvering between the powers to curry favor with the Turkish government.

The efforts at domestic retribution for the Armenian genocide were similarly ineffective. Although Courts Martial were instituted in Turkey, and a great deal of damning evidence concerning the genocide was revealed, its perpetrators emerged relatively unscathed. The fact that these trials were held at all likely was due only to the efforts of a weak post-war government to secure more promising terms for peace. Thus, the Courts were never given the power they needed to prosecute effectively the murderers of the Armenian people. Instead, the trials served only to stir a new ground swell of nationalist fervor among the Muslims which resulted in the emergence of the Kemalist regime. The Turks, like the Germans following World War I, were unwilling to accept the collective guilt that these domestic trials represented. Thus, after the Kemalist regime took power, the large number of the Courts Martial that had not

tain and bitterness with regard to foreign policies of governments. The irony of his remark stems from the fact that Lord Cecil, the son of the famous nineteenth century British Statesman Lord Salisbury, who is regarded as the architect of Article 61 of the 1878 Berlin Treaty, was one of the very few British diplomats who tried to implement the "Charter for Armenian Justice." The four clauses of that charter are described in R. HOVANNISIAN, *supra* note 142, at 248-49. Nansen is reported to have chastised Lord Cecil, "Your damned rotten government. Well, all governments are rotten." Cited by his daughter Liv Nansen, who under the married name Heoyer wrote and published the book NANSEN OG VERDEN (Nansen and the World) (1955), (cited in Yayloian, *Medz Deroutiunneri Goğme Moratzuadz Jhogovourt* (A People Forsaken by the Great Powers), 4 SOVETAKAN HAIASDAN 31 (1987)).

reached the verdict stage were dismantled, and the last opportunity at retribution disappeared. The European Powers, having lost the necessary cohesion and authority, were unable to prevent this result.

The series of mistakes and failures on the part of the European victors in World War I rendered the Armenian genocide impervious to both prevention and punishment. The failure of the justice process in this case (compounded by the dismal results of the German Leipzig trials) prompted the Allies to employ different methods at Nuremberg following World War II. This change was considerably facilitated by maintaining a modicum of consensus and unison among the victors. The German State and its subsidiary organizations were challenged on the main issue of the criminal abuse of sovereignty,<sup>391</sup> whereby its own citizens had become victims of "murder, extermination, enslavement, deportation." The Nuremberg Tribunal was not only a military court of occupation, but an international court as well. As such it pioneered in some crucial ways in overcoming areas of tension between national and international law to impose penal sanctions for crimes against humanity committed by a state. The procedural adaptations embedded in the Nuremberg Charter illustrate the point.<sup>392</sup> The resulting legal precedents circumscribed

391. United States Supreme Court Justice Robert Jackson played a key role in this respect. Questioning the relevance of the World War I arguments of the American members of the Commission on Responsibilities who adhered to the doctrine of the inviolability and immunity of the sovereign state, he declared, "[S]entiment in the United States and the better World opinion have greatly changed since Mr. James Brown Scott and Secretary Lansing announced their views. . . ." U.S. DEPARTMENT OF STATE, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON, 1945 18-20 (1949). In his opening statement, he counterposed to that doctrine the following arguments:

Of course, it was under the law of all civilized peoples a crime for one man with his bare knuckles to assault another. How did it come that multiplying this crime by a million, and adding firearms to bare knuckles, made a legally innocent act? The doctrine was that one could not be regarded as criminal for committing the usual violent acts in the conduct of legitimate warfare. . . . An International Law which operates only on states can be enforced only by war because the most practicable method of coercing a state is warfare. . . . The only answer to recalcitrance was impotence or war. . . . Of course, the idea that a state, any more than a corporation, commits crimes is a fiction. While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity. The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of states. . . . The Charter also recognizes a vicarious liability, which responsibility is recognized by most modern systems of law, for acts committed by others in carrying out a common plan or conspiracy to which a defendant has become a party. . . . [M]en are convicted for acts that they did not personally commit but for which they were held responsible because of membership in illegal combinations or plans or conspiracies.

R. JACKSON, THE NÜRNBERG CASE AS PRESENTED BY ROBERT H. JACKSON, CHIEF OF COUNSEL FOR THE UNITED STATES 82-83, 88-89 (1971).

392. The Agreement, an outgrowth of the work of the London Conference, was concluded at London, August 8, 1945. The Charter, under which the 1945-1946 Nuremberg trials were

the primacy and exclusivity of domestic laws concerning personal responsibility, international accountability and criminal liability for war-time conduct. These principles extended criminal liability to the highest officials of a state, including the sovereign, imposing severe restrictions on such defenses as superior orders, act of state, and military necessity.<sup>393</sup> Above all it paved the way for the affirmation of crimes against humanity as a supreme offense under international law, treating it as sub-

held, was annexed to the agreement. The Nuremberg principles, which emerged from a series of decisions associated with these trials, are significant in terms of both precedence and codification. In the Judgment for example, it is stated that,

The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal. The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories had been recognized by the civilized world.

Bassiouni, *supra* note 113, at 283. This decision is entirely in accord with the 1919 recommendation of the Commission on Responsibilities, cited in *supra* note 209. The following procedural adaptations spelled out in the Charter are likewise noteworthy:

Art. 3. Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the defendants or their counsel.

Art. 18 The Tribunal shall

- (a) Confine the trial strictly to an expeditious hearing of the issues raised by the charges.
- (b) Take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever.
- (c) Deal summarily with any contumacy imposing appropriate punishment, including exclusion of any defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Art. 19 The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.

Dep't of State Pub. No. 2420, *reprinted in* 39 AM. J. INT'L L. 257 (Supp. 1945).

393. The legal nuances of these restrictions, treated as a matter of customary international law, were extensively debated in the wake of World War I by British, French, and German jurists grappling with the proposed terms of the Versailles Treaty. For a detailed analysis of the exchanges see 2 J. GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* 483-501 (paras. 588-94) (1920); *see also* Wright, *War Crimes Under International Law*, LAW Q. REV. 40-52 (Jan. 1946), *reprinted in* WAR CRIMES COMMISSION, *supra* note 113, at 550-51. The Nuremberg Charter stipulation that crimes against humanity, in order to be prosecuted, have to be war-related, *i.e.*, "in execution or in connection with the war," was treated in general terms by the 1919 Turkish Military Tribunal. In its Key Indictment, it scorned the covert goals of the conspirators in their catapulting Turkey into war by a preemptive strike against Russia. TAKVIMI VEKAYI, No. 3540, May 5, 1919. In its Key Verdict it reiterated this point by citing the evidence supplied by one of the members of Ittihad party's Central Committee. TAKVIMI VEKAYI, No. 3604. The final report of the Commission on Responsibilities likewise underscored the fact that the war was "premeditated by the central powers together with their allies, Turkey and Bulgaria, and was the result of acts deliberately connected in order to make it unavoidable." It then linked these premeditated designs with the wartime perpetration of "barbarous methods in violation of the established laws and customs of war and the elementary laws of humanity." J. GARNER, *supra*, at 490.

sidary to common and uncommon types of war crimes, and as a source of the law of nations.<sup>394</sup>

The success of Nuremberg, however, should not obscure the ever present dangers that led to the failure of international law during the Armenian genocide. Given the nature of genocide, the practical problems attending the enforcement of legal sanctions are issues which continue to render questionable the viability of efforts at deterrence. Nor is there any great likelihood that any future initiatives of retribution will benefit from the degree of consensus among the participating states as existed at Nuremberg. The Nazi crimes were too extensive, the victim categories too numerous, and the resulting devastation too cataclysmic to permit the intrusion at Nuremberg of consequential disagreements among the Allies. Most important, the nations partaking in the judicial prosecution of Nazi crimes were, next to the Jews, the principal victims of Nazi atrocities. It is appropriate to wonder whether Nuremberg might have been contemplated at all, let alone instituted, if only the Jews and to some extent the Gypsies (at that time two vulnerable minorities with no parent-state to press for punitive justice) had been the sole victims of the Nazis. As Holmes articulated, there is no substitute for lived experience as an animus for law-making.

The history of the Armenian experience epitomizes the dilemmas and perils of minorities facing dominant groups determined to homogenize

394. The historical roots of this development, with particular reference to the nineteenth-century Armenian Question, deserve to be emphasized once more. When British Foreign Secretary Grey decided, after some hesitation, to join his French and Russian colleagues in endorsing the May 24, 1915 public warning against Turkey regarding a new wave of Armenian massacres, he "saw the threat of punishments as a continuation of nineteenth century policies against Turkish atrocities." J. WILLIS, *supra* note 12, at 26. Even more significant, Sir Hartley Shawcross, the British Chief Prosecutor at Nuremberg, singled out the Armenian case as the basis of the emergence of the Nuremberg law on crimes against humanity. Quoting Grotius to the effect that intervention is justified when atrocities are perpetrated by dictators against their own subjects, he declared:

The same view was acted upon by the European Powers which in time past intervened in order to protect the Christian subjects of Turkey against cruel persecution. The fact is that the right of humanitarian intervention by war is not a novelty in International Law

.....

This argument was preceded by his analysis of the limits of state sovereignty in relation to international law:

Normally International Law concedes that it is for the State to decide how it shall treat its own nationals; it is a matter of domestic jurisdiction . . . Yet International Law has in the past made some claim that there is a limit to the omnipotence of the State and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the State tramples upon his rights in a manner which outrages the conscience of mankind.

H. M. STATIONERY OFFICE, SPEECHES OF THE CHIEF PROSECUTORS AT THE CLOSE OF THE CASE AGAINST THE INDIVIDUAL DEFENDANTS, 63 Cmd. 6964 (H.M. Attorney-General, 1946).

their societies forcibly, and if necessary, through mass murder and extermination. As demonstrated in the main body of this study, the opportunities for mustering and executing such resolve are catalyzed during wars, especially global wars, where previously existing tensions often explode into domestic, state-sanctioned violence. This intimate association between war crimes and crimes against humanity was aptly highlighted at Nuremberg, and is a distinct feature of not only the Armenian and Jewish holocausts, but is also a recurrent theme in the genocidal killings in Bangladesh, Cambodia and Kurdistan.

Herein lies the contemporary relevance of the present study, exceeded only by its significance in the quest for a legally protected universe of human rights, the ultimate refuge of impotent and vulnerable minorities. To the extent that wars, regional or otherwise, become inevitable, genocide may prove unpreventable. If this is true, efforts to prevent future genocides must shift direction to focus on the prevention of wars, particularly those wars in which the fate of nationalities or minorities may be at risk.<sup>395</sup>

In addition, the effectiveness of efforts to punish perpetrators of genocides will hinge on the outcome of wars. The conditions needed are, as at Nuremberg, a clear and decisive victory, a concomitant unconditional surrender, and a firm resolve to prosecute and apply penal sanctions. Such justice cannot be taken for granted, however, regardless of the scope and intensity of atrocities perpetrated. It is fair to conclude in this respect that the Allies' perception and treatment of the Armenians as an insignificant and inconsequential victim group contributed in no small way to their eventual consignment of the Armenian case to oblivion. Likewise, the Allies' greater interest in positioning themselves in postwar relations than in pressing for justice against those who committed the genocide is an extremely disturbing yet important lesson for future generations.

## Conclusion

In summarizing the processes and conditions of the Armenian genocide, the shortcomings of the rules of international law incident to defective treaty clauses and abortive treaty engagements were examined as major contributing factors. The failure to prevent the genocide, and the antecedents of that genocide, was related to the absence of a predictable

395. See Dadrian, *The Anticipation and Prevention of Genocide in International Conflicts*, 18 INT'L J. OF GROUP TENSIONS 205-14 (1988); see also Dadrian, *The Convergent Aspects of the Armenian and Jewish Cases of Genocide: A Reinterpretation of the Concept of Holocaust*, 3 HOLOCAUST & GENOCIDE STUD. 151-69 (1988).

pattern of deterrence by the European Powers, and to a resulting increase in the vulnerability of the targeted Armenian population. The second half of the study was devoted to the investigation of the post-genocide judicial proceedings, to establish that while the proceedings sufficiently documented the fact of the genocide they failed to produce retributive justice to any significant degree. This double failure to prevent or to punish is perhaps the most important feature of the Armenian case, needing to be restated and reemphasized. To the extent that prevention of a crime is contingent upon the predictability of the punishment of that crime, retributive justice acquires critical significance in the control of future outbreaks of genocide. It may, therefore, be appropriate to conclude this study with a brief review of the overall ramifications for international law of the abortiveness of justice in the Armenian genocide.

When a crime such as genocide goes more or less unchallenged while being committed and unpunished afterwards, the crime becomes consequential in a dual sense. Not only is the victim's quest for justice denied but even more important, the perpetrator is encouraged to redefine the offense in non-criminal terms. Such a proclivity to redefine is almost always accompanied by a host of rationalizations. The portents of such denials have not been adequately appreciated by legists or statesmen. The denials may be pregnant with incentives for potential perpetrators to consider the initial crime a precedent warranting emulation. The more grave threat issuing from such denials concerns, however, the surviving victim population that may be targeted for an even more effective destruction. Lacking remorse, and emboldened by an erosion of existing inhibitions, the perpetrator resorting to denials may have little hesitation in repeating the crime under comparable circumstances.

It is conceivable that the truculent and persistent denials of the Armenian genocide by the Turks, past and present, may well presage such a repetition. The recent discovery of an official document, emanating from the Foreign Affairs Minister of the Kemalist government, ominously pointed in that direction at least 69 years ago.<sup>396</sup> In virtual replication of the genocidal designs of the previous Ittihadist regime, the document em-

396. Buried in a 1200-page tome, the document consists of a cipher telegram, dated November 8, 1920 sent by Ahmet Muhtar, then Ankara's Foreign Affairs Minister, to General Kâzım Karabekir. Karabekir was the Commander in Chief of the Eastern Front Army, and the compiler of a volume documenting the military campaign of the insurgent Kemalist movement. The first phase of that military campaign involved the invasion in September, 1920 of Armenia which since May, 1918 had acquired the status of a free and independent Republic. The inexperienced Armenian army, ill-equipped, ill-fed and ill-led, was unable to muster any substantial resistance. The set of instructions that comprise the blueprint for a new cycle of genocide were inserted in the cipher telegram sent Karabekir at the start of negotiations for an

bodied a new blueprint for genocide, directed against the Russian Armenians of the Transcaucasus.

Here are the essential components of this new conspiracy.<sup>397</sup> First, the ground was prepared to justify the crime through the following assertions.

By virtue of the provisions of the Sèvres Treaty Armenia will be enabled to cut off Turkey from the East. Together with Greece she will impede Turkey's general growth. Further, being situated in the midst of a great Islamic periphery, she will never voluntarily relinquish her assigned role of a despotic gendarme, and will never try to integrate her destiny with the general conditions of Turkey and Islam.

After the enumeration of these rationales the following decision was transmitted. "Consequently, it is indispensable that Armenia be eliminated politically and physically [*siyaseten ve maddeten ortadan kaldırmak*]." The General was further advised on the requisite methods to be employed.

Since the attainment of this objective is subject to [the limitations of] our power and the general political situation, it is necessary to be adaptive in the implementation of the decision mentioned above [*tevfiki icraat*]. Our withdrawal from Armenia as part of a peace settlement is out of the question. Rather, you will resort to a modus operandi intended to deceive the Armenians [*Ermenileri iğfal*] and fool the Europeans by an appearance of peacelovingness. In reality, however, [*fakat hakikatde*] the purpose of all this is to achieve by stages the objective [stated above] . . . [I]t is required that vague and gentle-sounding words [*mübhem ve mülâyim*] be employed both in the framing and in the application of the peace settlement, while constantly maintaining an appearance of peacelovingness towards the Armenians.

The cipher ends with the exhortation that "[t]hese instructions reflect the real intent [*makasidi hakikiyesi*] of the Cabinet. They are to be treated as secret, and are meant only for your eyes."

armistice. K. KARABEKİR, *İSTİKLAL HARBİMİZ* (Our War of Independence) 844-45 (2d ed. 1969). In the 1960 1st ed. the same cipher is at 961.

Precisely why this document was included in the book is unclear. It is conceivable that Karabekir was simply trying to be meticulous by making his documentary compilation as complete as possible without paying too much attention to the myriad details. It is most noteworthy that as far as it is known the document in question appears nowhere else, and that until now no one seems to have tried to assess its inordinate significance.

397. Previous to the receipt of this cipher Karabekir on November 6 had transmitted to the Armenians his own set of armistice terms. But Ankara's instructions obliged him to withdraw these terms, which the Armenians had accepted a day before, substituting new terms that were deliberately harsh so as to preclude their acceptance. Following the anticipated rejection of these new terms by the Armenians on November 10, Karabekir resumed his military campaign in a drive to Yerevan, the capital of Armenia. K. LAZIAN, *HAIASDAN YEV HAI TADU USD TASHNAKIRNERU* (Armenia and the Armenian Question According to Treaties) 191-202 (1942). See also FO406/44/E15522, Col. Stokes to Curzon.



The genesis of the document coincides with the defeat of Damad Ferit's Cabinet which had initiated the prosecution against the authors of the Armenian genocide. From that period on, the Court Martial proceedings slackened considerably, gradually disappearing. It was a period in which retributive justice within domestic law was being undermined by resurgent nationalism reacting to the devastating consequences of military defeat. The passive attitude of the victorious Allies in the face of this developing judicial fiasco was matched by their reluctance to come militarily to the rescue of imperiled Armenia. As Kazemzadeh caustically observed, "While Armenia was dying under Turkish blows the Western Powers who had made so many promises of help and assistance merely talked about her fate in the First General Assembly of the League of Nations [but] the fate of Armenia was sealed by defeat and Sovietization . . ." <sup>398</sup> In fact, the decision to destroy Armenia was made in Ankara following protracted deliberations which led to the firm conclusion that neither England nor any other Allied Power was likely to intervene on behalf of Armenia. <sup>399</sup>

Compressed in this single, official document is a succinct portrayal of the most salient features of the established genocidal legacy that has been examined throughout the body of this work. The recurrence of the World War I Ittihadist pattern of genocide is evident, and may be outlined as follows.

1. Lethal decisionmaking at the highest executive level of government, involving collective deliberations, crystallization of genocidal intent, authorization of exterminatory measures, and standard rationalizations to lend an appearance of legitimacy to the decision.

2. The opportunities afforded by a war, especially through reliance on the military machinery as the most convenient instrument of destruction and as an efficient command and control system, an optimum mobilization of resources under a plea of national emergency, and the compelling rationale of "military necessity" as a license for radical measures.

3. Efforts to conceal the incriminating material evidence of the secret intent of annihilation. <sup>400</sup> The chief reason for this recourse was the need

398. F. KAZEMZADEH, *THE STRUGGLE FOR TRANSCAUCASIA (1917-1921)* 292 (1951).

399. K. KARABEKIR, *ISTIKLAL HARBIMIZIN ESASLARI* (The Essential Components of our War of Independence) 32, 35 (1951).

400. The Turkish word *ığfal* is a standard term to denote seductive "deception" and was referred to in the text of this study, *see supra* notes 75, 79, to describe Grand Vezir Reşid's own characterization of the nineteenth-century Ottoman pretensions of reformism. These techniques of deception were used frequently by the Ittihadists during the war. To cite just one example, in a November 18, 1915 cipher, then Interior Minister Talat advised Aleppo

to eliminate any basis for post-war accusations of culpability. The document advocated use of the classic stratagem, namely trapping of the victim population, and lulling them into a manufactured sense of security. Among several such strategies and tactics employed during the war were two particularly effective ones. One was the conscription of the able-bodied male population which on the one hand trapped that very population, and on the other, reduced the rest of the Armenian population to an easy prey for destruction. The other involved the issuance of solemn governmental assurances that the only purpose of the deportations was temporary, wartime "relocation."

To enhance the level of plausibility, Turkish Foreign Minister Muhtar repeated the method of two-track orders practiced by Talat during the World War I enactment of the genocide. He sent on the same day a parallel cipher telegram to the same commander of the Kemalist forces. It contained completely opposite instructions which were meant to be public and to be relayed to the tottering Armenian government as Ankara's official terms for an armistice. It followed the "Wilsonian principle of self-determination" by requiring a plebiscite to delineate the frontiers. But in the secret cipher, General Karabekir was informed that the condition of a plebiscite, deemed impossible to meet, was inserted precisely "to prevent the determination of the very frontiers." The public cipher also invoked principles of "justice and humanity," insisting that "[t]he Ankara government harbors profound and genuine sentiments [*amik ve samimi*], consistent with its aspirations to foster the welfare of the Turkish, Armenian and other neighboring peoples alike." These professions were accompanied by pledges of support for "the complete independence and security" of Armenia, and by promises to dispatch "food supplies and other material assistance so that she may be able to recover economically."<sup>401</sup>

4. The use of subterfuges highlights another cardinal feature of the genocidal legacy under review here. Under "the pretext" (*vesile*) of protecting the rights of the Azerbaijanis, who are related to the Turks by ethnic and religious ties, the General was advised to: militarily occupy the entire territory of Armenia; temporarily arrange the frontiers of Armenia in such a way that "under the pretext of protecting the rights of Muslim minorities there is ground for constant intervention [on our

governor Abdulhalik to be careful in the handling of "the deportations" lest Europeans, especially American Consuls, uncover the actual intent to exterminate the Armenians. Talat instructed him to "create the conviction among foreigners" (*kanaatının tevlidi için*) that the aim of "deportation" is nothing but "relocation" (*tebdili mekân*). See Dadrian, *supra* note 169, at 355 n.102.

401. K. KARABEKIR, *supra* note 396, at 844.

part]" (*hukuku muhafaza vesilesiyle daimi müdahaleye zemin*); and disarm the Armenians, at the same time "arming the Turks of the area little by little, toward the goal of linking up east and west in the area, and molding Azerbaijan into an independent Turkish government through the creation of a national force structure."<sup>402</sup>

5. The Treaty of Sèvres which the Ottoman government signed on August 10, 1920 but failed to ratify, was mentioned in the cipher as a sore point for Turkey and her future. As with the 1878 Berlin Treaty, Sèvres began as an effort to improve the lot of the Armenians, but ended up compounding their misfortunes. However long overdue and deserved its terms might have seemed to the Armenians, its promise of restoring to the Armenians a large chunk of historic Armenia fueled extravagant Armenian hopes and irredentist aspirations. Placing too much faith in the resolve of the victorious Allies to make the treaty operational, the Armenian Republic ultimately became a victim again of the vagaries of international politics, barely two years after the end of the World War I genocide.

The design of that Turkish government to deliver a final blow to the rest of the Armenian people was foiled, however, by the last minute intervention of the 11th Red Army that was stationed nearby. By precip-

402. *Id.* at 845. The kinship ties between the Turks and the Azeris, their "cousins" in Soviet Transcaucasus, are reflected in the transfer of the Turko-Armenian conflict to the domain of Armeno-Azeri relations. The current flare-up of hostility between these two peoples within the Soviet Union, highlighted by the February, 1988 massacre of the Armenians in the Azerbaijani city of Sumgait, has jolted the Armenians into rediscovering the perils of their geopolitical vulnerabilities. The ferocity and heinous methods employed in the course of the massacre, and the inability of the Soviet security forces to prevent the carnage, were agonizing enough to resuscitate in the Armenian psyche the memories of the World War I genocide, and most particularly, the sense of total abandonment and helplessness. Called "pogroms" by Soviet Deputy Procuror-General Alexander Katusov, *BAKINSKI RABOTCHI* (Baku daily), Mar. 12, 1988, the outbreak was exacerbated by the Azeris who "carried posters of Khomeini of Iran to indicate that they considered the dispute a matter of Islamic pride and solidarity." *N.Y. TIMES*, Jan. 13, 1989. Other demonstrators in Baku carried Turkish flags. *MOSCOW NEWS*, Nov. 30, 1988. The painfulness of the episode was described by Times correspondent Keller as follows:

Like the Israelis, the Armenians are united by a vivid sense of victimization, stemming from the 1915 Turkish massacre of 1.5 million Armenians. Armenians are brought up on this story of genocide, and have a feeling of being surrounded . . . by the Islamic Azerbaijan, Iran and Turkey. This was reinforced in February by an anti-Armenian pogrom in the Azerbaijani city of Sumgait . . .

*N.Y. TIMES*, Sept. 11, 1988, § E, at 3. The linkage of enmity against Armenia to the Turkish perception of Armenia as a geographical obstruction to Turkey's direct access to other Turkish peoples in the Caucasus, and Turkey's resort to genocide as a device for removing that obstruction, were underlined by a noted expert on Russia and Panturkism. "The massacre in 1914-1916 of one and a half million Armenians was largely conditioned by the desire of the Young Turks to eliminate the Armenian obstacle which separated Ottoman Turks from the Turks of Azerbaijan, and to prepare the way for the territorial unification of the 'Oguz,' or southeastern group." S. ZENKOVSKY, *PAN-TURKISM AND ISLAM IN RUSSIA* 111 (1967).

itously sovietizing Armenia in the wake of the Turkish military victory, the Army averted the Armenian nation's all but certain extinction. Notwithstanding, Soviet Armenian sources have furnished evidence of a vast scale of devastation in the area of Alexandrapole (presently Leninakan, the site of the December 7, 1988 Armenian earthquake) which remained under Turkish occupation for five months.<sup>403</sup>

In assessing the future tasks of national and international law as they relate to genocide as a crime, the fundamental and universal mission of law must be underlined. That mission is to restrain human behavior under a system of sanctions or legal consequences.<sup>404</sup> In the absence of such sanctions, however, the concept of criminal behavior is bound to be diluted in the minds of offenders. Indeed, when sanctions fail to materialize with any degree of consistency in the case of a series of mass murders culminating in genocide, for example, the impunity accruing to

403. The dimensions of this miniature genocide are documented in many sources. In a telegram sent in June, 1921 to K.V. Chicherin, Soviet Foreign Affairs Minister, Al Miassnigian, the President of the Council of People's Commissars of Soviet Armenia, presented the following list of casualties in the wake of the withdrawal of the Turkish occupation forces from Alexandropole and environs.

[T]he total number killed by the Turks reached 60,000, of which 30,000 were men, 15,000 women, 5,000 children, and 10,000 young girls. Of the 38,000 wounded, 20,000 were men, 10,000 women, 5,000 young girls, and 3,000 children. Some 18,000 men were carried away as prisoners. Only 2,000 have survived; the rest have died either from starvation, exposure to the elements, or by the sword.

E. SARKISIAN & R. SAHAKIAN, *VITAL ISSUES IN MODERN ARMENIAN HISTORY* (Armenian Academy of Sciences, Yerevan, Soviet Armenia) 55-56 (E. Chrakian transl. 1965). The reference to the Soviet ultimatum which ended the five-month Turkish occupation of the city is at page 70.

In his memoirs Lieutenant-Colonel Rawlinson, a British officer, provided a glimpse of the fate of these 18,000 men, most of whom were deported to Erzurum in eastern Turkey as military prisoners. The Colonel was being held captive in that city as a hostage for the purpose of trading him for Turks being detained in Malta by the British as war criminals.

On leaving our old quarters we first saw "Armenian prisoners." Those we saw were being used as labourers (slaves would be the proper word), and accustomed as I had become to see starvation, misery, and privations of every description, yet the appearance of these men gave me, even at that time, a shock such as I had never before experienced, and a memory which will remain with me whilst life lasts. It was then midwinter, the snow everywhere lying deep, the force and temperature of the arctic wind being beyond description; yet those miserable spectres were clothed, if that word can be applied to their condition, in the rottenest and filthiest of verminous rags, through which their fleshless bones protruded in many places, so that it seemed impossible that humanity could be reduced to such extremities and live.

The Colonel concluded that the ultimate purpose was "to exterminate" the Armenians, which purpose "is, and has long been a deliberate policy of the Turkish Government." A. RAWLINSON, *ADVENTURES IN THE NEAR EAST 1918-1922* 307, 335 (1923). See also FO371/7877 at 7 (folio 148) (Feb. 1922). Another source describes the carnage in Kars following its capture when "for two full weeks the peaceful civil population of that city and the surrounding town was subjected to massacres." E. SARKISIAN & R. SAHAKIAN, *supra*, at 54; see also *id.* at 55-56.

404. The negative assumption implicit in this view was cogently articulated by Aristotle some 23 centuries ago: "When separated from law and justice man is the worst of all animals." ARISTOTLE, *POLITICS*, Bk. 1, ch. 2, at 6 (B. Jowett & T. Twining trans. 1959).

the offender group is capable of furnishing it the requisite incentive to repeat the crime against the same or a new victim. The persistence of Armenian clamors for justice, rendered impotent for so long by an equally persistent disinterest in remedial initiatives by the rest of the world, has the potential to make such an incentive compelling. The progressive escalation of the level of genocidal killing of the Armenians in Ottoman Turkey through episodic and recurrent massacres in the eras of Abdul Hamit and the Young Turk Ittihadists in particular is a paramount fact in this respect. In accounting for that fact Toynbee, who during the war compiled one of the most massive volumes documenting and detailing the Armenian genocide, recognized in this regard the intimate connections between official denials and more radical subsequent resorts to mass murder, "under the cloak of legality by cold-blooded governmental action." Decades later Toynbee explained the pattern of progression to more comprehensive and efficient levels of genocidal killing.<sup>405</sup>

The core problems of genocide transcend considerations of the fate of individual victim groups, or the peculiarities of a particular perpetrator-victim relationship. The mitigation, if not the elimination, of these problems devolves upon the further development of international law, the prime matrix of all human rights, including the rights of potential or actual genocide victims. Addressing the problem of impunity, the United Nations passed a resolution redefining and indefinitely postponing the criminal liabilities of the offenders on November 26, 1968—the Convention on the Nonapplicability of Statutory Limitations to War Crimes Against Humanity.<sup>406</sup> Article 1(b) includes the crime of genocide, even if it does "not constitute a violation of the domestic law of the country in which [it was] committed." The Convention implicitly inspires hopes for ultimate justice, belying the general maxim that justice

405. When challenging the wartime Turkish protestations of innocence, for example, Toynbee virtually dismissed the associated charges of treason and rebellion levelled against the Armenians as fabrications which will not "bear examination," are "easily rebutted," and are "found to rest on the most frivolous grounds," only to conclude that "it is evident that the war was merely an opportunity and not a cause." VISCOUNT BRYCE, *supra* note 132, at 627, 629, 631, 633.

This is what he wrote a half a century later in an autobiographical account:

The massacre of Armenian subjects in the Ottoman Empire in 1896 . . . was amateur and ineffective compared with the largely successful attempt to exterminate [them] during the First World War in 1915. . . . [This] genocide was carried out under the cloak of legality by cold-blooded governmental action. These were not mass-murders committed spontaneously by mobs of private people . . .

A. TOYNBEE, *EXPERIENCES* 241, 341 (1969).

406. G.A. Res. 2391 (XXIII), 23 U.N. GAOR, Supp. (No. 18) 40, U.N. Doc. A/7218 (1968).

delayed is justice denied. Counterposed to these hopes, however, is the specter of political forces whose traditions may continue to thwart the initiation of effective relief, indefinitely postponing the realization of these hopes.